The Central Law Journal.

SAINT LOUIS, OCTOBER 26, 1877.

CURRENT TOPICS.

THE members of the bar of the United States Circuit Court for the District of Iowa, at an adjourned meeting held on Saturday last, considered the recent charges against Judge Dillon, and passed, with reference thereto, a series of strong resolutions to the effect that they had investigated the charges against him and found them untrue, and expressing unabated confidence in his integrity. It is not clear that the friends of Judge Dillon have not paid too much attention to this matter. We have lately received letters from a number of judicious persons who have entire confidence in Judge Dillon, expressing this view. Still, the circumstances were very peculiar, and it was a matter about which opinions and tastes might well differ. It is certain that no accused magistrate was ever sustained with more complete unanimity by the bar and people of his circuit than Judge Dillon has been.

THE Supreme Court of Illinois has lately filed seventy-nine opinions at Mount Vernon. Our reporter has sent us reports of three of them, and abstracts of twenty-four more. These are all that are deemed of importance. Among these cases is that of *Safford* v. *The People*, in which the supreme court adjudge the receiver of a railroad, appointed by the United States Circuit Court, guilty of contempt of a state court for not obeying an injunction issued by the state court against the corporation prior to the time when he was appointed receiver. The opinion (by Walker, J.,) is written in heated language, and cites no authorities. It is, in our judgment, a complete judicial *faux pas*. It proceeds upon the false premise that a receiver is the agent of a corporation whom he dispossesses. A receiver is the agent of no one except the court by which he is appointed, and no other court can, without consent of that court, exercise any more authority over him than it can exercise over the judge of the court whose agent he is. We are profoundly astonished that such a decision should proceed from any appellate bench in the United States.

THE WEEK preceding the time of our going to press has been fruitful of events of interest to lawyers. The leading event has been the nomination by the President of General John M. Harlan, of Kentucky, to be an Associate Justice of the Supreme Court of the United States, *vice* David Davis resigned. The appointment had been expected for some days, and the news of it has been favorably received throughout the country. It has been generally agreed for some time that the appointment would be given to the South. General Harlan is an able lawyer and a fluent debater; a man of strong physique, capable of doing a great deal of work. In politics he is a republican of the straight sect, but is moderate in his views, and is popular with all parties in his state. He ran for governor on the republican ticket a few years ago, and made a canvass which greatly swelled the vote of his party, in a state where it has always been in a hopeless minority. We believe in promotion in judicial as well as in military offices, and should have been glad to see the high office to which General Harlan has been appointed reserved as a reward to some of the laborious circuit or district judges; but there is no doubt that General Harlan will develop into a strong judge, and that his appointment will justify the wisdom of the President.

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THE Court of Appeals of New York has recently promulgated certain rules regulating admission to the bar, which it is clear will tend to make the preliminary study of the student in that state something more than a mere form. The new rules require that the examinations for admission when not conducted by the court are to be conducted by a committee of three lawyers, of not less than seven years standing who are to be appointed as heretofore, and to hold their positions for one year; a compulsory clerkship of three years in an office, such clerkship being required of every candidate for admission, and no exemption being made of those holding the diplomas of law schools. To graduates of colleges one year allowance is to be made, an attendance at a law school will also be counted in, estimating time of clerkship; but no person can be admitted without at least one year's service in an office. Lastly, the admission after three years' clerkship is only to the degree of attorney, two years further study or practice and an additional examination being necessary to entitle to admission as a counselor. This striking reform in legal education in the wealthiest and most popular state of the Union, indicates that the people have become about tired of free trade in law. For it was public opinion, which, in 1847, caused the legislature to pass a bill providing that any person of good moral character, although not admitted as an attorney, might act as such if specially authorized in writing by the party employing him or personally nominated in open court; but it is almost certain that the public have at length discovered that the practice of the law is not exactly a trade. We would commend the New York rules to some other states, in which the claims of the "poor boy" have sheltered a great deal of professional blacksmithing.

IN one of the courts of Pittsburg, the novel question is presented whether one of the ordinary courts of judicature can, by its process, compel the governor and other executive officers of the state to attend and give evidence before a grand jury touching the orders given for the movement of troops in the recent labor riots. The court in

question has entered the following order: "In the matter of the application of the grand inquest now in session, for a process to compel the attendance before them of certain alleged defaulting witnesses. And now, (20th October, 1877), after argument and upon consideration, the application is allowed, and attachments are hereby directed to be issued for and against the following named persons, being the same indicated by the grand inquest as in default, to wit: His excellency John F. Hartranft, Governor of the Commonwealth; the Hon. W. S. Quay, Secretary of the Commonwealth; General James Lotta, Adjutant General of the Commonwealth; General R. M. Brynton, and Major A. Wilson Norris." The position of the governor is that the evidence which he and the other officers of the executive department of the state are thus called upon to give relates to state secrets and is privileged. We have no doubt whatever that the position of the governor is correct. Important state matters have always been considered privileged in every government, not only in courts of justice, but even as against legislative inquiry. Besides, if the governor and chief executive officers of a state are amenable to the process of the *nisi prius* courts, they can be compelled to attend upon these courts in different parts of the state to an extent which might practically abolish the exercise of their official functions. But a stronger reason is that such attempts on the part of one department of the government to coerce the officers of another department, would lead to an unseemly conflict between two co-ordinate branches of the government, in which the courts, without power to enforce their process, must succumb, and thus incur popular contempt.

In Peyser v. Mayor of New York, 16 Alb. L. J. 283, the New York Court of Appeals recently held that if an assessment is regular on its face, so that its collection can be enforced by seizure or sale, and evidence *aliunde* is necessary to show its invalidity, money paid thereon is paid involuntarily or by coercion of law and may be recovered back. Although this principle is not new, the opinion of the learned judge contains an interesting discussion of the terms coercion in fact and in law. "By the first," he says, "I mean the duress of person or goods, where present liberty of person, or immediate possession of goods, is so needful and desirable, as that an action or proceedings at law to recover them, will not at all answer the pressing purpose. Duress of person is exemplified in Forshay v. Ferguson, 5 Hill, 154; Eadie v. Shimmer, 26 N. Y. 9. The case of Maxwell v. Griswold, 18 How. (U. S.) 242, 256, and Harmony v. Bingham, 12 N. Y. 99, illustrates what is duress of goods. Coercion by law is where a court having jurisdiction of the person and subject-matter has rendered a judgment which is collectible in due course. There the party cast in judgment may not resist the execution of it. His only remedy is to obtain a reversal, if he may, for error in it. As he can not resist the execution of it when execution is attempted he may as well pay the amount at one time as at another, and save the expense of delay. It may be well to say, that, if the judgment is not afterwards reversed, but is invalid for any collateral reason, or the process issued upon it is illegal, payment with knowledge of the fact would perhaps be voluntary, which seems a sound distinction taken by Emott, J., in Lott v. Sweezy, 29 Barb. 87-92. To each case of coercion by law. as is above given, are to be added those *quasi* adjudications of inferior tribunals, such as assessors of taxes or assessments, where their proceedings are regular on their face, and on presentation make out a right to have and demand the amount levied, and to collect it in due course of law by sale of goods or municipal lease of real estate. Unless void on their face, they have the force of a judgment; the party is legally bound to pay and has no lawful mode of resisting. The only remedy is a reversal of the adjudication. Until reversed they give the collector the right to take and sell the goods and the assessment remains a *prima facie* valid lien upon real estate. Bank of Com v. The Mayor, 43 N. Y. 184-8." See, also, Bank of United States v. Washington, 6 Pet. 8; Sturgess v. Allis, 10 Wend. 355; Clark v. Pinney, 6 Cow. 297; N. Y. & H. R. R. v. Marsh, 12 N. Y. 308; Marsh v. City of Brooklyn, 59 N. Y. 280; Washburn v. Burnham, 63 Ib., 132.

Senator McCreery, of Kentucky, has introduced a bill to repeal the bankrupt law, and has followed it by introducing an amendment to the effect that the repeal shall apply to all proceedings commenced after the 20th of October, 1877. The practical effect is to suspend the filing of all petitions in involuntary bankruptcy until its fate shall become known. The people are evidently getting tired of a law which has furnished such a cloak for fraud; but at the same time there is a considerable sentiment in favor of a national insolvent law, uniform throughout the United States and Territories. Our belief is that if the bankrupt act is abolished, it will be found that for a trading people as close-knit together as we are, the inconvenience of some forty different insolvent laws is too great a clog upon commerce to be long endured. Equally desirable, we believe, but yet no doubt a good way off, is a national code of commerce, applying to inter-state carriers, highways, bills of exchange, and the like. Our belief is that we are no more in a condition to return to the state insolvent laws than we are to return to the shinplaster money emitted under state laws, which preceded our present excellent national currency. Still, in the present condition of the country, it seems probable that the bankrupt law will go overboard—that we must take a step backward before we can step forward. The fact is, that no system of insolvency can remain popular, for the reason that under any system a large amount of every estate is necessarily consumed in fees, and the creditor is obliged to take but a percentage of his

debts, and in many cases nothing at all. Under these circumstances he has but two remedies, both of them very unsatisfactory. One is to "go down to the tavern and cuss the judge," and the other is to "go down to the tavern and cuss the law." And thus a swelling clamor of popular dissatisfaction, incapable of reforming the supposed evils of the system, finds itself capable of uprooting it altogether.

The bankrupt act has evidently reached a period of decay. This is shown by the fact that within the past year the state insolvent laws have been called into requisition to a considerable extent in various parts of the country. The question has been mooted in one or two cases, whether these laws apply to corporations where corporations are not expressly named, and whether they exclude the ordinary remedy by bill in equity. This latter question has been ruled in the negative in the State Savings Bank case by the Circuit Court of Cook County, Illinois, at Chicago, which we shall publish next week. The principal reason for upholding the jurisdiction of a court of equity to appoint a receiver in such a case, was that the receiver would have power to collect assets which an assignee could not reach.

THE POWER OF A PARTNER TO BIND THE FIRM BY BILLS OF EXCHANGE AND PROMISSORY NOTES.

The right, which one partner ordinarily has, to bind the firm of which he is a member, by affixing the partnership name to bills and notes, is well stated in the opinion of Mullin, J., in Nat. Union Bank of Watertown v. Landon, 66 Barb. 193. "As a general proposition," he says, "a co-partner has the right to give a promissory note in the name of the firm without, and even against, the assent of his co-partner; and all the members of the firm will be liable thereon, provided it be given in good faith, for partnership purposes, or to one who pays for it a valuable consideration without notice that it is given for a purpose not within the scope of the partnership." This rule is well settled. Porter v. White, 39 Md. 613; Wagner v. Freschl, 56 N. H. 495; Blodgett v. Weed, 119 Mass. 215; Mechanics' Bank of Williamsburgh v. Foster, 44 Barb. 87; Gale v. Miller, Ib. 420. Indeed, this power is so essential to the transaction of business through the medium of a partnership, and so usual an incident of it, that it is implied from the very existence of the firm. Faler v. Jordan, 44 Miss. 283; Sylverstein v. Atkinson, 45 Ib. 81; Windham Co. Bank v. Kendall, 7 R. I. 77; Swan v. Steele, 7 East, 210; Fox v. Clifton, 7 Bing. 795. The liability extends to all who at the time were members of the firm, whether named in the firm or not, whether known or secret partners, and to those holding themselves out to the public or the party interested as such. Wintle v. Crowther, 1 Tyrw. 215; *Ex parte* Hamper, 17 Ves. Jr. 403; Davis v. Allen, 3 N. Y. 172. The holder may sue those only who were known to him to be partners at the time of the contract, or, if he please, he may join others subsequently discovered. De Mantort v. Saunders, 1 B. & Ad. 398.

The rule, however, is usually limited to firms of a trading or commercial nature. Ulery v. Ginrich, 57 Ill. 531; Hunt v. Chapin, 6 Lans. 139. Where, therefore, the partnership is special,—that is, limited to a particular undertaking or class of business,—and no acts of the partners are shown holding themselves out as general partners, one partner can not bind the other by any agreement outside of the particular partnership business. Livingston v. Roosevelt, 4 Johns. 251; Prince v. Crawford, 50 Miss. 344; Kimbro v. Bullett, 22 How. 256; Graves v. Kellenberger, 51 Ind. 66. And even where the partnership is general, the note will not be valid if given for a purpose obviously beyond the ordinary scope of the business. Lime Rock F. & M. Ins. Co. v. Treat, 58 Me. 415.

The stipulations or agreements made by the partners between themselves, whether by articles of partnership or otherwise, can not effect the rights of third parties unless brought to their notice. It would be obviously unjust to incorporate the secret instructions which the partners give each other, or the limitations imposed *inter se*, as terms of the agreements made with outside parties. Barrett v. Russell, 45 Vt. 43; Bank of Rochester v. Monteath, 1 Den. 402; Ontario Bank v. Hennessey, 48 N. Y. 545.

It is sometimes the custom of a firm to transact its business in the name of one of the partners, or of one who is not a member of the firm, and in such case the name so adopted and used will be regarded as the firm name. Crocker v. Colwell, 46 N. Y. 212; Ontario Bank v. Hennessey, *supra;* see also Smith v. Turner, 9 Bush, 417; Doty v. Bates, 11 Johns. 544. But where one partner gives his separate security for the firm debt, the firm will not be liable thereon. Seffkin v. Walker, 2 Camp. 307; Cunningham v. Smithson, 12 Leigh, 43; Emly v. Lye, 15 East, 7. In Thayer v. Smith, 116 Mass. 363, it was held that one who indorses, for the accommodation of a firm, a promissory note signed by one of the members in his own name as maker, and by the other as indorser, can recover against the firm the amount which he has been obliged to pay as indorser. See Coster v. Clarke, 3 Edw. 411. In Kirk v. Blurton, 9 M. & W. 284, where the name of one of the members was used as the firm name, it was held that a bill accepted by another member in that name, with the addition of "& Co.," would not bind the firm. A note beginning "I promise," and signed by one of the firm for the rest, is a firm note. *Ex parte* Buckley, 14 M. & W. 469; Gallway v. Mathew, 10 East, 264; Staats v. Howland, 4 Den. 559; Doty v. Bates, 11 Johns. 544. So when a partner draws a bill or note in a fictitious name, and indorses the firm name thereon. Thicknesse v. Bromllowe, 2 Cr. & J. 425. A material variation in the partnership will render the paper void. Kirk v. Blurton, 9 M. & W. 284. But when the variation is slight and immaterial, the firm will be bound. Williamson v. Johnson, 1 B. & C. 146; Faith v.

Richmond, 11 A. & E. 339; Forbes v. Marshall, 11 Ex. 166. A partner can not execute a joint and several note in the firm name. Perring v. Howe, 2 C. & P. 401. But such note would be good as a joint note. Maclae v. Sutherland, 3 E. & B. 36.

Where a person is a member of two firms, one firm can not sue the other upon paper bearing the latter's signature, upon the familiar principle that no one can be at the same time both plaintiff and defendant. Pitcher v. Barrows, 17 Pick. 361; Babcock v. Stone, 3 McLean, 172; Mainwaring v. Newman, 2 B. & P. 120; Moffatt v. Van Milligan, Ib. 124; Neale v. Turton, 4 Bing. 149. The remedy in such case is in equity. But where the paper is indorsed over, the holder may bring an action. Pitcher v. Barrows, *supra;* Davis v. Briggs, 39 Me. 304. And see Richmond v. Heapy, 1 Stark. 204; Brandon v. Scott, 7 E. & B. 234; Aistley v. Johnson; 5 H. & N. 137; Ihmsen v. Negley, 25 Penn. St. 297.

It is ordinarily no part of the business of a firm to lend its credit for the benefit of third parties, and a partner has no authority to sign the firm name for such purpose. Laverty v. Burr, 1 Wend. 529. Foot v. Sabin, 19 Johns. 154. Though, as in other cases, such defense can not be set up against a *bona fide* holder for value. Catskill Bk. v. Stall, 18 Wend. 466. An authority for one partner to give such a note may be shown by circumstances. Butler v. Stocking, 8 N. Y. 468. Or it may be ratified, and the ratification shown in like manner. First Nat. Bank of Ft. Dodge v. Breese, 39 Iowa, 640. And a new consideration is not necessary to support the promise of the ratifying partner. Commercial Bank of Buffalo v. Warren, 15 N. Y. 577. The mere fact, however, that a partner, upon being informed that his co-partner has given the firm note for his individual debt, does not deny his liability thereon, does not constitute a ratification *per se*, though it may be a a circumstance to show assent. Reuben v. Cohen, 48 Cal. 545. Nor would a payment ignorantly made. Hayes v. Baxter, 65 Barb. 181.

No right exists in a partner to use the firm name as guarantor or surety upon his individual note. Tompkins v. Woodyard, 5 W. Va. 216; Fielden v. Lahens, 2 Abb. Ct. of App. Dec. 111. But where a firm had authorized a partner to borrow money for it, and allowed him frequently to fill up notes over their blank signatures, and to sign the names of the members to obligations, and such partner borrowed money for the use of the firm, upon his own note, with the names of his co-partners indorsed thereon as guarantors, it was held that it did not matter even if their names were so signed by such partner, as he was held out to the world as having authority to do what he did, and that he had power to consent to an alteration of the note, as to the place of payment, at the time he delivered the same and obtained the money thereon. Pahlman v. Taylor, 75 Ill. 629.

One partner has power to make a partnership note for a debt due from the firm to a co-partner, payable to the order of such co-partner; and a third partner can not defend against the indorsee on the ground that the note was made without his consent, and that the indorsee had notice of such fact. Smith v. Lusher, 5 Cow. 688. One member of a firm may order the contents of a negotiable note payable to the firm, to be paid to himself, without the knowledge or consent of the other members, and may maintain an action thereon in his own name. Burnham v. Whittier, 5 N. H. 334. And if one partner indorse a receipt of a part payment on a promissory note, the property of the partnership, in satisfaction of his individual debt, it has been held that the firm can not, in a suit at law, rescind such payment and sue for the original amount. Craig v. Hulschizer, 34 N. J. (Law) 363; though it is said in the same case that the rule does not apply where the firm are defendants.

The power of raising money for the necessities of the firm being a general one, an acting partner may, for such purpose, accept a bill of exchange in the firm name, to be given in return for the acceptance of another firm, it being in effect only giving the firm name to secure an indorser. Gano v. Samuel, 14 O. 592.

Questions may also arise where changes have been made in the firm. In Shaw v. McGregory, 105 Mass. 96, it was held that, if a new firm, formed from an old firm by the retirement of a member, succeeds to and continues the business of the old firm in the same place, slight evidence is sufficient to warrant the inference that it has assumed the liabilities of the old firm; and if it has assumed such liabilities, a partner has the same right to give partnership notes in payment of them as he has to give such notes in payment of the debts of the new firm. And see Gano v. Samuel, *supra*.

After public dissolution, the members of a partnership are not liable upon negotiable paper made and indorsed without their knowledge in the name of the firm, although the proceeds have been applied to the partnership debts. Haven v. Goodel, 1 Dis. 27; Perrin v. Keene. 19 Me. 355; Woodworth v. Downee, 13 Vt. 522; and see Parker v. Macomber, 18 Pick. 505; Fellows v. Wyman, 33 N. H. 351. But unless the fact of dissolution is made public, the firm will be liable. Pecker v. Hall, 14 Allen, 532; Moore v. Lackman, 52 Mo. 323; Taylor v. Hill, 36 Mo. 494; Davis v. Allen, 3 N. Y. 172; Vernon v. Manhattan Co., 17 Wend. 524. But see Farmers & Mechanics' Bank v. Greene, 1 Vroom, 316, where no notice of the dissolution was given. In Cavitt v. James, 39 Tex. 189, it was held that a surviving partner could not convey a bill or note by indorsement. But after the dissolution of the firm, the liquidating partner may borrow money to pay a firm debt and give the firm note for it; but any member can not do so without the consent of the others. McCowin v. Culbinson, 72 Penn. St. 358; Lloyd v. Thomas, 79 Id. 68; Randolph v. Peck 1 Hun, 138; Rice v. Goodenow, Tappan, 94. A note given after dissolution may be ratified. Carter v. Pomeroy, 30 Ind. 438. Where, however, a note or check is

made before dissolution but not delivered till afterwards, it is a nullity. For legal purposes it will be deemed to have been signed at the time when it is transferred. Gale v. Miller, 54 N. Y. 536.

After a debt has become barred by the statute of limitation, one partner can not bind his copartner by giving the firm note for such debt. Newman v. McComas, 43 Md. 70. But see Merritt v. Day, 38 N. J. (Law) 32, where a payment of interest upon a note after dissolution, was held to revive it as against the statute. And to the same effect is Sage v. Ensign, 2 Allen, 245.

It is a presumption of law, when a member of a firm gives a note in the firm name, that such note was given for partnership purposes, and the burden of proof is on the firm to show the contrary. Carrier v. Cameron, 31 Mich. 373; Silverstein v. Atkinson, 45 Miss. 81. But when the firm is a non-trading partnership, it lies upon the holder to show that the note was given by the authority of the other partners. Smith v. Sloan, 37 Wis. 285, And where the infirmity appears upon the note, or is known to the holder, it is incumbent upon him to show that the firm were interested in the loan, or that the partners consented to the use of their names. Bank of Rochester v. Bowan, 7 Wend. 158; Wilson v. Williams, 14 Id. 146. Where the partners in their defense show facts which would prevent a recovery by the payee, the holder must show that he took it in the usual course of business without notice of the defect. Munroe v. Cooper, 5 Pick. 412; Michigan Bank v. Eldred, 9 Wall. 544.

As to what constitutes notice to the holder, it has been held that where the name of the firm appears upon the note as sureties or guarantors, it is the duty of one taking the paper to inquire into the circumstances. Wilson v. Williams, *supra;* Boyd v, Plum, 7 Wend. 309; Tanner v. Hall, 1 Penn. St. 417; Gansevoort v. Williams, 14 Wend. 133. Where a third person finds the note in the hands of the maker, this is notice that the firm indorsement was for the accommodation of the maker. Hendrie v. Berkowitz, 37 Cal. 113. For cases where the facts were held not to amount to notice, see Moorehead v. Gilmore, 77 Penn. St. 118: Com. River Bank v. French, 6 Allen, 313; Chemung Canal Bank v. Bradner, 44 N. Y. 680; Hayward v. French, 12 Gray, 453; Parker v. Burgess, 5 R. I. 277.

In Windham County Bank v. Kendall, 7 R. I. 77, a partner indorsed a partnership note with the name of the firm for the purpose of raising money for his individual use, and to cover up such use, he directed that no notice of dishonor of the note should be given to the firm, or that notice should be given in such mode as to insure that it should come to his own hands only, and it was held that the firm was bound to an innocent holder by the indorsement, waiver and mode of notice directed.

As between the partners themselves, one who uses the firm name on an accommodation note without the knowledge or consent of his partners, is accountable to them for any subsequent loss. Nor does the recognition and payment of such note alter the liability. Smith v. Loring, 2 O. 440. The fraud committed upon the partners by the unauthorized use of the firm name, is a fraud upon the individual partner, and the cause of action therefor is no part of the assets of the firm, although the notes have been paid out of such assets. Nor does such right of action pass by general assignment of the firm property, or all of the interest in the partnership assets to one of the partners injured. Calkins v. Smith, 48 N. Y. 614.

S. H. T.

LIBEL — PUBLICATION OF CONTENTS OF PETITION FOR DIVORCE.

BELLE BARBER v. ST. LOUIS DISPACTH CO.

St. Louis Court of Appeals, March Term, 1877.

HON. EDWARD A. LEWIS, Chief Justice.
" ROBERT A. BAKEWELL, } Associate Justices.
" CHAS. S. HAYDEN, }

1. LIBEL—PRIVILEGED PUBLICATION.—Where a court or public magistrate is sitting publicly, a fair account of the whole proceedings, uncolored by defamatory comment or insinuation, is privileged, whether the proceeds are on a trial, or on a preliminary and *ex parte* hearing.

2. SAME.—To make it privileged there must be at least so much of a public investigation as is implied in a submission to the judicial mind with a view to judicial action.

3. SAME — PUBLISHING CONTENTS OF A PETITION FOR DIVORCE.—A petition for divorce was filed in the circuit court against plaintiff, charging her with adultery. Defendant, before the petition was brought before the court for judicial action, published in its newspaper the substance of the petition without defamatory comments. *Held*, that the publication was not privileged, but that the law presumed malice therefrom, and that an action for libel would lie.

4. SAME—MALICE A QUESTION FOR THE JURY.—But the question of malice is one for the jury on all the facts in evidence, and it is not for the court to say whether or not defendant has by its testimony rebutted the presumption arising from the publication.

Appeal from the Circuit Court of St. Louis County.

Marshall & Barclay, Chandler & Young, for appellant; *Everett W. Pattison*, for respondent.

HAYDEN, J., delivered the opinion of the court:

This is an acton for an alleged libel upon the respondent published in the *St. Louis Dispatch*, a newspaper owned and circulated by the appellant. The petition states that the plaintiff had formerly been the wife of one Lewis D. Langley, and had long before the date of the publication complained of, procured a divorce from him, and was restored to her maiden name of Belle Barber; that she was well known by the name of Belle Langley; that defendant was the proprietor of a newspaper called the *St. Louis Dispatch*, and published therein of and concerning her certain false, scandalous and defamatory matter. The publication complained of was the following:

"CONJUGAL INFELICITY.

"Lewis D. Langley, formerly a *resident of the town of Litchfield, Ill., has* brought suit for divorce from his wife, Belle Langley, accusing her of having, during the summer of 1871, committed adultery with George Pomeroy, *a conductor on the St. Louis & Indianapolis Railroad*, at Litchfield, and subsequently with him and divers other men in St. Louis. About a year after

his marriage to defendant, which occurred August 28, 1869, a child was born, of which he denies being the the father."

The petition then alleges damages and asks for judgment.

The answer denied any knowledge or information as to the divorce of plaintiff and restoration to her maiden name. It admits the publication of the words and matter as charged, but alleges that the same was a fair and substantive report of a legal proceeding in the Circuit Court of St. Louis County, and that the publication was made in course of its business, without intent to defame plaintiff.

Plaintiff in her reply, denied that the publication was a fair and substantive report of a legal proceeding in said court, but alleged that the proceeding referred to was a mere *ex parte* complaint filed in said court long anterior to the date of the publication, and that the same was accompanied by defamatory observations and comments; and denied that it was made in the ordinary course of business, or that it was the business of defendant or its legal right to publish and circulate defamatory matter of and concerning plaintiff, or that it had any right to publish the article complained of.

On the trial, the plaintiff proved that she had been divorced from Louis D. Langley on the 18th day of January, 1873, and that her maiden name had been restored. The publication, as above given, was there read in evidence. The defendant offered evidence tending to prove that the managers of the newspaper did not know plaintiff and had no desire or intention to injure her; that the proceedings of the courts were published only as news, and that the publication complained of was made in the usual course of defendant's business. The defendant introduced in evidence a transcript of the record in the suit against the present plaintiff for divorce, by which it appeared that on the 18th day of June, 1873, the petition was filed and summons issued; that there was personal service on the 25th day of June, on the defendant in the case, Belle Langley; that she filed her answer in the following October, alleging her prior divorce, and that thereupon Louis D. Langley dismissed his suit. It was the petition in this last named case that was the subject of the publication and the appellant claimed that the publication was a fair report of the petition. The respondent denied this and insisted that by the insertion of the words, which we have put in italics, and otherwise, the publication, became something different from a mere statement of the facts, as alleged in the petition.

At the request of the respondent the following instructions were given:

1. The jury are instructed that the publisher of a newspaper has the right to publish, as an item of current news, a fair report of the proceedings of a court of justice, provided both the parties interested in such proceedings are before the court. But he has no right to publish a report of a mere preliminary proceeding against a party, or of the statements made by one party in a petition filed for the purpose of instituting suit against another. If, therefore, the jury believe that the defendant's newspaper contained a report of a preliminary proceeding against the plaintiff, or a report of statements contained in a petition filed by some third party against her for the purpose of instituting suit against her, they will find for plaintiff.

2. The jury are instructed that the publisher of a newspaper has the right to publish only such proceedings of courts, as are sufficiently recent to constitute them current news. If, therefore, the jury believe that the proceedings, an account of which was published by the defendant in this case, had taken place so long before the publication that it had ceased to be an item of current news, they will find for the plaintiff.

3. The law presumes that a man intends the natural consequences of his acts. If, therefore, the jury believe that the natural consequence of the publication complained of was to defame and injure plaintiff, they may properly infer that such was the intention of defendant, and that the publication was maliciously made.

4. If the jury find for the plaintiff, they will assess her damages at such sum as will be a full compensation for the injury naturally and probably resulting from the publication complained of. And if the jury believe that the publication was malicious they may give such sum by way of exemplary damages as they shall think proper, the whole amount of damages not to exceed ten thousand dollars.

The court gave the following for the appellant:

No. 1.—The jury are instructed that if they believe from the evidence that defendant made the publication complained of without malice or intent to injure plaintiff then the plaintiff is entitled to recover only such compensatory or actual damages as she has shown to have sustained by reason of said publication, and nothing more.

The following are the material instructions which were asked by the appellant and were refused:

No. 1.—This court instructs the jury that on the pleadings and evidence in this case, they will find for defendant.

No. 2.—If the jury believe from the evidence in this suit that the publication complained of, was a fair report of the proceedings or petition filed in court in the case of Louis D. Langley v. Belle Langley, they will find for defendant.

No. 3.—The jury are instructed that if they believe from the evidence that the publication complained of was made by defendant in the ordinary course of his business as a fair and impartial report of a proceeding commenced in the Circuit Court of St. Louis County, and is a fair report of a bill for divorce, filed on the 18th day of June, 1873, by Louis D. Langley against Belle Langley, and was published without malice or intent to injure plaintiff, they will find for defendant.

No. 4.—In order for the jury to find a verdict for the plaintiff in this case, they must first find that there was actual malice on the part of defendant in making the publication sued for; and there is no evidence of actual malice in this case.

The jury found for the plaintiff in the sum of $3,500. On a motion for new trial, the court gave the plaintiff the option of remitting $1,000 of the damages, or having the motion sustained. The plaintiff remitting, judgment was entered for $2,500.

The general question here involved is whether the publication in the newspaper of the defendant belongs to the class of publications called privileged communications,—that is, publications which would be libellous, but which are not so because the occasion and manner of the publishing are such as to rebut the inference of malice arising from the publication of matter which on its face is libellous. But the question on which the answer to this depends is not that which has been most discussed by counsel, namely, whether the same rule in reference to privileged communications that extends to trials where both parties are before the court, extends also to *ex parte* proceedings. This question has, no doubt, a bearing upon the legal issue before the court, but a solution of it in favor of the appellant will not necessarily involve the conclusion which the appellant desires to reach. Indeed, it may be granted that the general rule is as follows: Where a court or public magistrate is sitting, publicly, a fair account of the whole proceedings, uncolored by defamatory comment or insinuation, is a privileged communication, whether the proceedings are on a trial, or

on a preliminary and *ex parte* hearing. But the very terms of the rule imply that there must be a hearing of some kind. In order that the *ex parte* nature of the proceedings may not destroy the privilege,—to prevent such a result, there must be at least so much of a public investigation as is implied in a submission to the judicial mind with a view to judicial action. This will be apparent if we regard the reason of the rule. Perhaps the earliest, certainly one of the best expressions of the reason of the rule, is that contained in the opinion of Lawrence, J., in Rex vs. Wright, 8 Term, 298 and often since quoted, with approval. It is there stated, in substance, that though the publication of proceedings in courts of justice may severely reflect on individuals, yet such publications, if they contain true accounts, are not libels, nor the subjects of actions, because it is of great importance that the proceedings of courts of justice shall be known; that the general advantage to the country in having these proceedings made public, more than counterbalances the inconvenience to the person whose conduct may be the subject of the proceedings. But the proceedings there alluded to were proceedings in open court, as is shown not only by the judge's language, but by the case to which he makes direct reference and upon which his remarks hinge. The case of Curry v. Walter, 1 Esp. 456, the publication was of a speech made in open court, in printing which in the *Times* the supposed libel consisted. So where it is said, "It is of great consequence that the public should know what takes place in court, and the proceedings are under the control of the judges," (per Lord Campbell, Davison vs. Duncan, 7 E. & B. 231) or, "we ought to make as wide as possible the right of the public to know what takes place in any court of justice," (per Ch. B. Pollock in Ryalls v. Leader, Law Rep. 1 Ex. 299), it is apparent that judicial proceedings in open court are spoken of. Indeed, the English cases on which the appellant most confidently relies are all cases of proceedings in open court, or before a public magistrate sitting as a court. Curry vs. Walter has been noticed above. In Lewis vs. Levy, E. B. & E. 537, the plea was that the proceedings took place "before a public court of justice, to-wit, a justice of the peace then sitting and holding a public court;" that "the proceedings were had in the said public court," "upon the hearing of the said charge," etc., Lord Campbell, in denying the position that the privilege must be confined to the proceedings of superior courts, said: "But on such a question the dignity of the court cannot be regarded; and we must look only to the *nature of the alleged judicial proceeding* which is reported." The decision proceeds distinctly upon the ground of a hearing, an investigation, of judicial inquiry and action. Lord Campbell further remarked: "But although a magistrate upon any preliminary inquiry respecting an indictable offense, may, if he thinks fit, carry on the inquiry in private, and the publication of any such proceedings before him would undoubtedly be unlawful, we conceive that, while he continues to sit *foribus apertis*, admitting into the room where he sits, as many of the public as can be conveniently accommodated, and thinking that this course is best calculated for the investigation of truth and the satisfactory administration of justice (as in most cases it certainly will be), we think the court in which he sits is to be considered a public court of justice." In other cases it is stated that the publication is a mere extension of the area of publicity; that while the court room can contain but few persons, the public press indefinitely extends the field of notoriety. An examination of the later cases, Pierce vs. Goodlake, 15 L. T. (N. S.) 676; Wason vs. Walter, 4 Q. B. Law. Rep. 93, where Lord Cockburn's decision is based upon the anology between public proceedings in courts of justice and public debates in the houses of parliament, and the advantage to the people that it should be known what passes within their walls. Hunter vs. Sharp 4, Foster & Fin. 983, will show that a hearing and an inquiry in public is essential to bring the publication within the rules as to privileged communications. It may be safely asserted that if a London newspaper were to publish the one-sided statements of a bill filed in the Divorce Court merely upon its filing and previons to its coming before that court for judicial action, the Court of Queen's Bench would not, upon the authority of Curry vs. Walter, or Lewis vs. Levy, or Wason vs. Walter, decide that such a publication was privileged. Those cases are authority to the contrary, not only upon their facts, but by reason of the limitations which are expressly laid down in them. He who seeks to stretch a wholesome rule beyond its legitimate application, attacks the rule itself; and the able judges who decided those cases were too good logicians to impair the force of their own arguments, by extending an exceptional rule to cases where the reason that creates the exception does not exist. So, too, in the case of Ackerman v. Jones, 37 N. Y. Supr. Ct. 43, the publication expressly described a public appearance and statement of a criminal charge before a magistrate, and it appears that the affidavit as presented to the magistrate, was considered and acted upon by him, and that process issued upon it. The court, in its opinion, said: "The affidavit in question became a part of the regular judicial proceedings in a criminal suit by the people on the complaint of Burleigh."

Enough has been said to show that, upon the authorities, the present publication is not within the rule in regard to privileged communications. The publication was not merely of the fact that a petition for divorce had been filed, but it purported to give the contents of a petition which had never been brought before the court at any sitting, or with a view to judicial action. No proceedings in open court had taken place, and, in fact, no proceedings in open court ever did take place in the suit for divorce from the time of the filing of the petition to the time of the dismissal of the suit. The statements made in this publication were not only of a kind to disgrace and degrade the plaintiff in the estimation of the community, but they impute an act which may be a crime under the statutes of this state. *Prima facie*, the words are actionable, (Wag. Stat. 519, sec. 1; Stieber v. Wensel, 19 Mo. 513), and their use raises the presumption of malice; that is, not of any actual design to injure, but of that wrongful intention which the law presumes to be the concomitant of an act which it condemns as wrong. This being the case, is there any great public advantage overriding the injury that would ensue in cases of this kind to individuals?

That injury is apparent. If every paper on which a clerk of court marks the word "filed" is a privileged communication, and the person who spreads its contents broadcast before the public is exempted from the penalties which the law imposes on those who injure the reputation and property of others, consequences most serious will follow. A court may well pause before it makes a decision to this effect, unsanctioned as such a decision would be by any authority. Papers may be filed as declarations or petitions, which are filled with libellous matter. Their mere filing is no guaranty that the plaintiff intends to go to trial upon them. They may be so composed as to blast reputations and ruin business. They might be published with the most malicious design, yet, if privileged, the effect would be, practically, to deprive the injured party of redress. The anomaly, too, would be presented, that while the law would afford the defendant a remedy against the person who brought the suit, (for the latter

would be liable in damages for a malicious action), it would afford no redress against the libeller, whose publication may have produced the greater injury. Nor if a publication is to be privileged, merely because a petition is on the files, is it easy to see why the filing of an affidavit, or deposition, even though it may be totally inadmissible in evidence, and may be subsequently stricken from the files, does not confer a like exemption? When a matter is before a court upon a hearing, subject to the control and direction of the court, the right of publication may well be allowed. But where a paper is filed by a private person, perhaps not even with intent to produce an investigation, he who chooses to publish it should do so at his own risk. It is better that a craving after anything but wholesome should be disappointed, than a reputation assailed. If the charges of the petition are not baseless, they will soon be made the subject of judicial action, in one form or another, and when they are made such, the law, from motives of public policy, makes all proper publications in regard to them privileged communications.

Though the first instruction given for the respondent is not a strictly accurate expression of the law, yet upon the facts of this case the giving of it could not have injured the appellant, except so far as it contains the expression, "as an item of current news." But whatever error exists in respect to these words is more plainly repeated in the second instruction. The first clause of this tells the jury that the publisher of a newspaper has a right to publish only such proceedings of courts as are sufficiently recent to constitute them current news. In stating this the court below evidently mistook the purpose or office of an allegation in the defendant's answer. The defendant, to rebut the presumption of malice, alleged that the account was published merely as an item of news. But there was no obligation on the defendant to prove that which is implied by the instruction, nor does the instruction express any rule of law. If the filing of the petition was not a recent event at the time of the publication, the jury might have drawn inferences from this fact; but the respondent was not entitled to such an instruction as that numbered two. Not only does it state a proposition which is not a rule of law, but disregarding all the other issues in the case, it tells the jury to find for the plaintiff, if they "believe that the proceeding, an account of which was published by the defendant in this case, had taken place so long before the publication that it had ceased to be an item of current news." This issue may have been fairly raised, but it was not the only nor even the principal issue in the case. It can not be said that the error of this instruction did not injure the appellant, unless we indulge in the supposition that the jury conceived the instruction to mean something different from what it says. This hypothesis we can hardly proceed upon. If the jury understood the instruction to mean what it says, the action of the court below in giving it may have injured the appellant, and the judgment must be reversed for this error.

The question of malice was for the jury on all the facts in evidence. It was not for the court to say whether the defendant had by its testimony rebutted the presumption arising from the publication. But the giving of the second instruction asked by the respondent virtually took the issue as to malice out of the case. There was no error in giving the instruction as to damages. The judgment of the court below is reversed and the case remanded. All the judges concur.

A COUNSEL, being questioned by a judge to know "for whom he was concerned," replied: "I am concerned, my lord, for the plaintiff, but I am employed by the defendant."

BANKRUPTCY—HOMESTEAD.

IN RE SAUTHOFF & OLSON.

In the United States Circuit Court, Western District of Wisconsin.

Before HON. CHARLES E. DYER, District Judge.

1. HOMESTEAD PURCHASED WITH PARTNERSHIP ASSETS.—Where a copartnership is insolvent, or is possessed of assets not more than adequate for the payment of debts, one member of the firm can not, upon retiring, rightfully withdraw beyond the reach of creditors, and to their injury, a portion of the assets or property, and make a personal appropriation of those assets by putting them in the shape of a homestead.

2. SAME.—A homestead so purchased will be decreed to be given up if it appears to the satisfaction of the court that the funds with which it was purchased were wrongfully withdrawn from the partnership assets.

Sauthoff & Olson were copartners, doing business at Madison, Wisconsin, as dealers in clothing. The copartnership was formed in 1865, and the parties continued in business until January 27, 1876, when Sauthoff purchased from Olson his interest in the business, and the firm was dissolved.

From the testimony it appears that there was about the same quantity of goods in the store at the time of the dissolution as at the time of the bankruptcy. The outstandings of the firm at the time of dissolution, on their face, amounted to about $10,000. Their liabilities then due and to become due, were a little over $9,000, of which amount about $6,000 remained unpaid when the petition in bankruptcy was filed.

By the terms of dissolution, Sauthoff was to pay Olson, for his interest in the property and business, $6,500; and the transaction was consummated by the payment to Olson, in cash of $1,000, the execution by Sauthoff to Olson of two notes, one for $1,000 and the other for $1,850, and by the further delivery to Olson of a portion of the book accounts of the firm, such portions so delivered amounting to $2,650 on their face. Sauthoff assumed the firm debts and continued the business, making some additional purchases of goods and incurring new liabilities therefor.

In April, 1876, but little more than two months subsequent to the dissolution, Sauthoff was unable to meet his liabilities, which included such as remained unpaid by the late firm, and sought a compromise with his creditors, offering them thirty cents on the dollar. Subsequently, and within a short time, bankruptcy proceedings were commenced against Sauthoff and Olson. Previously, and in March, 1876, Olson had purchased a homestead. He had also collected about $1,400 in money from the outstandings turned out to him by Sauthoff at the time of the dissolution of the firm. A portion of this money, together with the $1,000 which Sauthoff had paid him in cash, was used by him in partial payment of the purchase price of the homestead. The remainder of the accounts in his hands, uncollected, and amounting to about $1,250, he, subsequent to the bankruptcy, on demand, delivered to the assignee.

The stock in trade in the hands of Sauthoff at the time of the bankruptcy, was subsequently sold by the assignee for about $8,200. From the accounts and demands which came to the assignee, he collected about $1,400.

The assignee, in behalf of creditors, by the present proceeding, seeks to reach the amount paid in cash at time of the dissolution, by Sauthoff to Olson, $1,000; and also the sum of $1,400 collected by Olson upon the book accounts which he took on the transfer of his interest to Sauthoff, and to charge the homestead prop-

erty of Olson, acquired as before stated, with the payment of so much of these amounts as was expended in the purchase of that property, it being claimed on the part of the assignee that the dissolution of the copartnership, and the payment by Sauthoff to Olson of the $1,000, and the delivery to the latter of a portion of the book accounts of the firm, operated as a fraud upon creditors, and that Olson should restore to them what he thus received.

No payment has been made to Olson by Sauthoff upon the notes for $2,850, given upon the termination of the copartnership.

H. M. & H. A. Lewis, for assignee; *Vilas & Bryant*, for bankrupt, Olson.

DYER, J.:

In a case where a copartnership, which is indebted, has been dissolved, the retiring partner withdrawing, on transfer of his interests, a portion of the assets or capital, and the transaction being followed at a not very remote period by the insolvency of the member assuming the debts and continuing the business, it is the duty of the court, when called to consider the rights and liabilities of the parties, to look cautiously into the facts with the view to the discovery of any possible fraud, and the correction of any wrong that may have resulted to creditors.

The principle is elementary that in equity, partnership creditors have an absolute priority of claim upon the partnership property for payment of their demands, and that the interest of each individual partner is his share of the surplus, after payment of the partnership debts. To such an extent has this rule been carried, that it has been held, that where a partner sells his interest to a stranger, or it is sold upon execution against him, his right to have the partnership debts paid, and his liability therefor discharged out of the property, are not divested by the sale, and that such a sale gives to the purchaser only an interest in such assets as may remain after the payment of partnership debts. Menagh v. Whitwell, 52 N. Y. 146; Osborn v. McBride, 16 N. B. R. 22.

The sale of partnership property by one of a firm of commercial partners on the eve of his insolvency, will be set aside. Saloy v. Albrecht, 17 La. Ann. 75.

The appropriation by an insolvent firm of partnership property to the payment of the individual debts of one partner, is not simply void, but is fraudulent, and avoids the deed of assignment. Wilson v. Robertson, 21 N. Y. 587.

Admitting the full force of these principles, it is also true that they are not so enforced as to operate against or affect a dissolution of a copartnership made in good faith, and which is unaccompanied by any improper withdrawal of assets beyond the reach of creditors. "The right of copartners upon dissolution to transfer the joint property to one of the firm, is clear and unquestionable. The effect of such a transfer, as between the partners, is to vest the legal title to the property in the individual partner, with a right to use and dispose of it as his separate estate. * * * * * If in such transfer there is no fraud and collusion between the copartners for the purpose of defeating the rights of the joint creditors, and the transaction is made in good faith upon dissolution, and for the purpose of closing the affairs of the partnership, the joint property thereby becomes separate estate with all the rights and incidents, both in law and equity, which properly attach thereto." Howe *et al.* v. Lawrence *et al.*, 9 Cush. 555.

These are principles applicable to a case where one partner retires and the other takes the entire property and assets; and they are substantially reiterated in Sage v. Chollar, 21 Barb. 598; and in Waterman v. Hunt, 2 R. I. 298. See also Dimon v. Hazard, 32 N. Y. 65.

Where, however, the circumstances of the case show that the dissolution of the partnership is a fraud, as if it be an incident to a scheme for giving one creditor a preference, or for enabling a member of the firm wrongfully to appropriate assets which should be applied in payment of partnership debts, or where the conversion of joint into separate assets is a result contemplated, and is the motive, or one of the motives, of the act of dissolving the firm, the act may be avoided by the joint creditors. *In re* Waite & Crocker, 1 N. B. R. 373.

The correctness of the testimony *in re* Boothroyd & Gibbs, 14 N. B. R. 223, can not be questioned, namely: "that the purchase by an insolvent trader of a homestead upon the eve of bankruptcy, with knowledge of his insolvent condition, and for the purpose of placing the property beyond the reach of process, is a legal fraud which no court should hesitate to hold void as to creditors."

Advancing a step further, where a copartnership is insolvent, or is possessed of assets not more than adequate for the payment of debts, one member of the firm can not, upon retiring, rightfully withdraw beyond the reach of creditors, and to their injury, a portion of the assets or property, and make a personal application of those assets by putting them in the shape of a homestead.

Under such circumstances, though it takes the form of a homestead, the property is as much within the reach of a court of equity as before, and no such change in its form or character can give it new sacredness or endow its possessor with new privileges in its ownership or use. Keeping in view the principles thus stated, the question now is, whether, upon the facts, the transaction between Sauthoff and Olson is one which must be condemned as a fraud, in fact, or law, upon their creditors.

First, without referring to the circumstances in detail bearing upon the point, it may be stated that the evidence does not show that there was any actual intended fraud in the act of dissolution. Although the interest of the retiring partner, based upon the estimated value of assets, was greatly exaggerated, I think the intent of the parties in dissolving their business relations, as disclosed by the the testimony, was honest, and that positive bad faith is not to be imputed to them.

Admitting this to be true, the question still remains, whether their actual pecuniary condition was such as to justify the withdrawal by Olson of the assets which were taken by him when the partnership was dissolved. The amount so withdrawn was $2,400. He took $2,650 in book accounts. Of these he collected $1,400 and returned the balance to the assignee. It is true that the $1,000 paid him in cash by Sauthoff was then raised by loan on pledge, as collateral security, on a mortgage on Sauthoff's homestead, held by his brother. But subsequently the holder of the mortgage as such security having obtained judgment against Sauthoff for the $1,000, it was held by this court that Sauthoff's brother, as the assignor of the mortgage, stood in the position of a surety, and was entitled as such to protection; and there having been an execution levy under the judgment upon Sauthoff's stock, it was ordered that the $1,000 be paid in full from the general fund, so that ultimately it came from the assets of the concern, and to that extent in fact diminished them. Now the question is, keeping in view the rights of creditors, was the actual pecuniary condition of this firm such as to entitle the retiring partner to appropriate the amount of their assets which he in fact received, and to place them in the form of exempt property?

In settling this question the principle we must

apply is, that if a retiring partner takes out a portion of the assets of a firm for his individual use, he must do so without impairing the fund to which the creditors have the right in equity to look for payment, and it must be made clearly to appear that such remaining fund is ample. If such partner receives more than his interest in the surplus after payment of the firm's indebtedness, equity must treat it as a wrong to creditors; and this equity can not be avoided by the fact that the partners believed that enough remained to pay the partnership debts, if, in fact, after making such appropriation in favor of one or both partners, the remaining assets prove insufficient.

The results to be reached one way or the other in this case depend, of course, upon what shall be the determination as to the sufficiency of the assets of the firm left by Olson for the payment of the partnership debts.

On their face the book accounts of the firm amounted to between $9,000 and $10,000, and this was the value placed upon them by the parties. But that they erred greatly in judgment is demonstrated by the fact that only about $2,800 of the accounts have thus far proved of any value, and of this amount the assignee has received about $1,400, the bankrupt Olsen retaining the balance. What further moneys may be derived from such of the accounts as are uncollected is not known.

Concerning the value of the stock of goods of which the parties were possessed at the time of the dissolution, it is quite impossible upon the present testimony to arrive at a satisfactory conclusion. Complications in this connection arise, because of the fact that no distinction has been preserved in the bankruptcy proceedings between the debts of the firm and those incurred by Sauthoff subsequent to the dissolution. Goods purchased by Sauthoff on his individual credit were mingled with the original stock. Debts were paid by him from the common fund without regard to those contracted by the firm and those contracted by himself. The sale made by the assignee included goods on hand at the dissolution and those purchased subsequently, and so far as distribution has been made no distinction has been observed between the firm creditors and the subsequent individual creditors of Sauthoff.

Of course no part of the moneys which it may be determined Olson should restore can rightfully be used in the payment of individual liabilities incurred by Sauthoff subsequent to the dissolution. And in view of the necessity of ascertaining with accuracy the value of the assets of Sauthoff and Olson at the time the copartnership was dissolved, I shall direct a further reference to take testimony upon that question.

Having settled the principles upon which the rights of the parties are to be determined, upon the coming in of that testimony, it can be ascertained what amount if any should be restored to the fund by Olson for application upon the partnership indebtedness.

It has been urged by counsel for respondent that by their course of dealing with Sauthoff, selling him goods, giving him fresh credit, and permitting such goods to be mingled with the old stock, the creditors must be held to have ratified the transaction between Sauthoff and Olson, and are now estopped from asserting a claim upon the property withdrawn by the latter from the assets of the firm. But it can not be claimed that the action of the creditors operated to release Olson from liability for the firm's indebtedness, and I fail to see how their subsequent dealing with Sauthoff so far sanctioned the appropriation by Olson of the moneys he took out of the firm as now to deprive them, if it shall be found that the remaining assets were insufficient to pay their debts in full, of the right to follow those moneys.

The present order will be, that the case be referred to the register to take testimony and ascertain what was the fair actual value of the assets of the firm of Sauthoff and Olson at the time of the dissolution of the firm, the value of the stock in trade, fixtures and book accounts, to be separately stated. Also to ascertain what proportion of the stock of goods sold by the assignee was held by the firm at the time of dissolution, and what was the amount and value of the goods purchased by Sauthoff on his individual account subsequent to the dissolution.

LIABILITY OF BANK DIRECTORS.

GERMAN SAVINGS BANK v. WULFEKUHLER.

Supreme Court of Kansas, July Term, 1877.

[Filed September 25th, 1877.]

HON. ALBERT H. HORTON, Chief Justice.
" D. M. VALENTINE, } Associate Justices.
" D. J. BREWER, }

1. FACTS OF WHICH A BANK DIRECTOR MUST TAKE KNOWLEDGE.—A person who holds the office of director and vice-president of a bank, and at the same time has private and personal dealings with the bank, is conclusively presumed to know, so far as the same affects his said personal dealings, the general condition and management of his bank, and to know everything of importance that occurs therein, either at the time it occurs or soon thereafter. He is bound to know when his bank is in an embarassed condition, and the condition of an account which has been overdrawn for several months; and where the cashier gives a credit of $2100 to the person having such overdrawn account, for an insufficient and illegal consideration, such officer is bound to know the same within less than several days thereafter.

2. BANK CAN NOT BUY ITS OWN STOCK.—A bank, organized under the laws of Kansas, can not purchase its own stock, except in some cases for the purpose of securing a previously existing debt.

3. LIABILITY OF A BANK DIRECTOR.—Where W., a stockholder and also a director and the vice-president of such a bank, sells his stock of such bank while the bank is in an embarrassed condition to H., who has no funds in the bank, but, on the contrary, has an overdrawn account with the bank of several months standing, and W. receives in payment for his stock a check for $2100, drawn by H. on the bank; and H. then sells said stock to the cashier of the bank, who purchases it for the bank, but who has no authority from the bank or from any one else to purchase the same for the bank, and the cashier gives to H. a credit for such stock for $2100 on the books of the bank, and on the same day the cashier gives to W. a credit on the books of the bank for the amount of said check and charges H. with a like amount; and several days thereafter W. draws said amount of $2100 out of the bank; *Held*, that the bank may maintain an action against W. for the amount of money so drawn out of the bank. And it makes no difference, in such a case, that said stock may in fact have belonged to W. and his brother as partners, and that all the transactions in selling said stock, in getting said credit, and in drawing said money out of the bank, may have been carried on in the name of the firm. The acts of the cashier in said transactions can not estop the bank as against W., who is a director and the vice-president of the bank.

Error from Leavenworth County, *F. P. Fitzwilliam*, for plaintiff in error; Messrs. *Green & Foster*, for defendant in error.

VALENTINE, J., delivered the opinion of the court.

This was an action brought by the German Savings Bank of Leavenworth, Kansas, against Henry W. Wulfekuhler, for the sum of $2,100, alleged to have been obtained wrongfully from the bank by the said Wulfekuhler. Judgment was rendered in the court below in favor of the defendant, and the bank now brings the case to this court. The principal facts of the case are as follows: The bank was organized under

the laws of the State of Kansas. The defendant was one of the original incorporators, and a subscriber for 100 shares of the capital stock of the bank. Each share was for $100. He paid two assessments on said shares—each assessment being ten per cent of the amount—and received two receipts therefor, each receipt being for $1,000. No certificates of stock were ever issued to him; and these receipts were the only evidences of his ownership of said stock which he ever held. The books of the bank, however, furnished other and sufficient evidence of his ownership of said stock. He was a director of the bank, and also its vice president during the occurrence of all the following transactions, although at the time of said occurrence he was sick, and did not take any active part in the direction or management of the business of the bank. Also, during the same time, he and his brother, Fred. Wulfekuhler, were partners, carrying on a wholesale grocery business under the firm name of Rohlfing & Co. Said bank stock really belonged to this firm, although it was purchased and held in the name of the defendant, Henry W. Wulfekuhler. On the 4th of September, and for some time previously, the bank was in an embarrassed condition. On that day Fred. Wulfekuhler sold said bank stock to Henry M. Herman. The defendant indorsed his name on said receipts, and Fred. Wulfekuhler delivered the same to Herman; and Herman, in return, drew a check on said bank in favor of Rohlfing & Co. for $2,100, and delivered the same to Fred. Wulfekuhler. Herman was at that time, and had been for several months previously, owing the bank on an overdrawn account; and the president of the bank had only a few days previously instructed both the cashier and the assistant cashier of the bank not to honor any more of Herman's checks. Herman delivered said receipts to the cashier of the bank, and, on the next day (September 5th, 1873,) obtained a credit therefor for $2,100, to be entered in his favor on the books of the bank. Herman and the cashier considered this transaction as a sale of said stock to the bank, but the stock was never transferred on the books of the bank, as required by statute, (Gen. Stat. 197, sec. 27), and also as required by the by-laws of the bank, but the stock still continued to remain on the books of the bank in the name of the defendant. Neither does it appear that the cashier had any authority to purchase said stock. Also on that same day, (September 5th, 1873), the book-keeper of Rohlfing & Co. took said check of Herman's to the bank, and the cashier gave to Rohlfing & Co. a credit therefor of $2,100, and charged Herman with a like amonnt. Rohlfing & Co. (or, in other words, the defendant and his brother Fred.), afterwards, but not for some days thereafter, drew out of the bank said $2,100, with which they had been credited on Herman's check. On September 17th, 1873, the bank, on account of financial embarrassment, closed business. On September 18th, 1873, the president of the bank tendered said receipts to the defendant, and demanded that the defendant should pay back to the bank said $2,100, but the defendant declined to do so, and then the bank commenced this action to recover said amount. The bank was reopened for business on September 29th, 1873.

The only question necessary to be now considered is whether this action can be mantained upon the foregoing facts and the law of the case. Now, for the purposes of the case, we shall assume that the defendant acted in the best of faith in all the foregoing transactions; that the transaction with Herman was intended to be a *bona fide* sale of the defendant's stock to Herman; that, in fact, the defendant and his brother did not know of the embarrassed condition of said bank; that they did not know of the condition of Herman's account with the bank; that they did not know that Herman's check was not good; that they did not know anything concerning the transactions between Herman and the cashier; that they did not know, when they received said money from the bank on Herman's check, that they received it in consideration of a credit given to Herman for said stock receipts; and that, in fact, they believed when they received said money that they were simply receiving money from the bank which Herman had previously deposited with the bank. And assuming all these things, (which are assumptions in favor of the defendant and against the plaintiff), then can the plaintiff recover? We think it can. For while we assume, as a matter of fact, that the defendant knew nothing of the condition or management of said bank, and nothing of the condition of Herman's account with the bank, yet still, as a matter of law, we think we must presume that he knew all about these matters. He was a director and the vice president of the bank, and it was his duty to have such knowledge; and, therefore, the law will conclusively presume that he had it. (Merchants' Bank v. Rudolf, 5 Nebraska 527; United Society of Shakers v. Underwood, 9 Bush. (Ky.) 609; Morse on Banks and Banking, 90 *et. seq.* 97 *et. seq.* and 115.) He can not now, as against the interests of the bank and its stockholders, and perhaps its creditors, be allowed to plead ignorance and innocence, and thereby profit by his own want of knowledge and by his own failure to do his duty as an officer of the bank. Such would be against both morals and law. Of course we do not hold that a director is bound to know everything that transpires in a bank, and at the very time when it occurs. But we do hold that a director, having personal and private dealings with his bank, is bound to know, (so far as the same affects his said personal dealings), the general condition and management of his bank, and everything of importance that occurs therein, either at the time it occurs or soon thereafter. In the present case, the defendant was bound to know when he received Herman's check, and when he obtained the credit thereon, that the bank was embarrassed, and that Herman had no funds in the bank. And he was bound to know, when he drew the money out of the bank, that Herman was still owing the bank. and that the said credit to Herman of $2,100 was merely for said stock receipts. Said stock receipts probably belonged to the firm of Rohlfing & Co., which was composed of the defendant and his brother Fred., and the said money was drawn from the bank by the firm, and not merely by the defendant, but this makes no difference; for each member of the firm was bound to take notice of all of which the other had notice, or was bound to take notice; (Merchants' Bank v. Rudolf *ante*); and each member of the firm is liable in a separate action for all that the firm might be held to be liable. And as the firm obtained said money from the bank without any legal consideration therefor, as we shall presently see, the bank may recover it back. In Pennsylvania it has been held that it is a fraud upon a bank for the holder of a check to present the same to the bank and receive a credit therefor, when he knows that the drawer of the check has no funds in the bank with which to meet it. Peterson v. Union National Bank, 52 Penn. St. 206. The supposed sale of said stock from Herman to the bank was void. The cashier had no authority from the bank or from any one else to purchase it, and no one had any power to give him any such authority. A bank can not purchase its own stock, except in some few cases, for the purpose of securing some previously existing debt. There is no law that attempts to give a bank any such power. And the purchasing by a bank of its own stock is not one of the objects for which banks are created, and is not legitimate banking business. For a bank to use its funds in the purchase of stock, is to withdraw that

much of its capital from legitimate banking business; and to purchase its own stock, is in effect a withdrawal of that much of its stock from actual existence, and in that way the bank might reduce the amount of its capital stock below the amount required by law, to wit, $50,000, (Gen. Stat. 225, sec. 128), and might also impair, or even destroy all security given by law to the creditors of the bank. The law provides in effect that not only the bank with all its property shall be liable for its debts, but also that each stockholder in the bank, to the amount of his stock, shall also be held liable. (Const. art. 12, sec. 2; Gen. Stat. 198, sec. 32.) But if a bank may purchase in all its stock and own it itself, then where would be the security to the creditors of the bank except in the bank itself? They could not, after exhausting the property of the bank, find any stockholders to sue. The law never contemplated any such a thing. But the law not only fails to authorize a bank to purchase its own stock, but in effect it prohibits such a thing. Section 26 of the act authorizing the creation of banks provides that "no corporation created under the provisions of this act shall employ its stock, means, assets or other property, directly or indirectly, for any other purpose whatever, than to accomplish the legitimate objects of its creation." (Gen. Stat. 197.) Now as the defendant, or rather himself and his brother as partners, received said money from the bank, without the bank ever receiving any consideration therefor, and as the defendant was at the time a director and the vice president of the bank, and is therefore conclusively presumed to have known all these facts, the bank may recover the money back from the defendant. The acts of the cashier can not estop the bank as against the defendant, who was a director and the vice president of the bank. Such officers can not be allowed to wrongfully use the funds of the bank, and then plead that the same was allowed by either the one or the other of such officers. They make themselves liable by so using the funds of the bank. The court below tried this case upon the theory that the defendant, as a director and vice president, was not bound to know the condition of the bank, and the condition of Herman's account, and was not bound to know, when he and his partner drew said money out out of said bank, that they drew the same out of the bank without any consideration to the bank, and for this reason the court erred in instructing the jury, and especially erred in not granting a new trial to the plaintiff. The judgment of the court below will therefore be reversed, and cause remanded for a new trial. HORTON, C. J., concurring.

BANKRUPTCY — DISCHARGE — ASSENT OF CREDITORS.

IN RE EDWARD E. WHEELER AND JAMES D. RIGGS.

United States District Court, District of Indiana.

Before HON. WALTER Q. GRESHAM, District Judge.

DISCHARGE — ASSENT OF CREDITORS. — Where the indebtedness was contracted prior to January 1, 1869, the assent of the creditor to the discharge is immaterial, and can not be counted in estimating the proportion, whose assent is necessary to give validity to the discharge.

ON HEARING of application for discharge.

The bankrupt act of 1867, as amended July 27, 1868, and July 14, 1870, furnishes the provisions which constitute section 5112 of the Revised Statutes, which reads as follows: "In all proceedings in bankruptcy commenced after the first day of January, 1869, no discharge shall be granted to a debtor whose assets shall not be equal to fifty per centum of the claims proved against his estate, upon which he shall be liable as the principal debtor, unless the assent in writing of a majority in number and value of his creditors, to whom he shall have become liable as principal debtor, and who shall have proved their claims, is filed in the case, at or before the time of hearing of the application for discharge; but this provision shall not apply to those debts from which the bankrupt seeks a discharge, which were contracted prior to the 1st of January, 1869."

There is no distinction made between voluntary or involuntary cases. In all proceedings in bankruptcy the discharge of the bankrupt is made to depend upon the payment of fifty per cent., or, failing in that, upon the assent of a certain proportion in number and value of his creditors, who have proved their claims and to whom he is bound as principal. A restriction is placed upon the creditors; it is only those whose claims accrued after January 1, 1869, whose assent is indispensable; none whose debts were contracted prior to that date are to be taken into account. Their assent is not necessary, and they are not to be counted for the purpose of determining whether the requisite number and value have assented. The provision does not apply to them.

The amendment of 1875, makes important changes in this provision as to discharges. It declares that in compulsory or involuntary bankruptcy, no provision of the law as it then stands requiring the payment of any portion of the debts of the bankrupt or the assent of any portion of his creditors, as a condition of discharge from his debts, shall apply. But the involuntary bankrupt may, if otherwise entitled, be discharged by the court in the same manner and with the effect as if he had paid the required per cent., or as if the requisite number and value of creditors had assented. It changes the terms of discharge in voluntary cases, by reducing the required payment to thirty per cent. And it declares expressly that "the provision in section thirty-three of said act of March 2, 1867, requiring fifty per centum of said assets, is hereby repealed." The amendment concludes with a repeal of all acts and parts of acts inconsistent with that act, June 22, 1874.

The effect of this repeal, so far as the involuntary class of bankruptcy proceedings is concerned, is clear enough. Indeed, without words of repeal, the substitution of new provisions covering the whole ground of the former legislation on that subject would operate as a repeal by implication. The effect of the express repealing language is confined to the repeal of so much of section thirty-three (now section 5112 Rev. Stat.) as requires fifty per cent. Nor will it be easy to show any inconsistency between the last clause of 5112, by which the creditor whose debts were contracted before hot 1st of January, 1869, are excluded from the provisions for payment and assent, and any of the provisions of the amendment.

That clause of exclusion stands unrepealed, and is in full force to-day.

It follows, therefore, that a bankrupt who finds himself unable to pay thirty per cent. on the debts proved against him is not required to obtain the assent of those creditors who became such before January 1, 1869. The assent of those of latter date is alone necessary. To apply these views to the case in hand: The bankrupts, Edward E. Wheeler and James D. Riggs, having applied for discharges and being unable to show a sufficiency of assets, as required by the act, are attempting the alternative of getting relief by means of the assent of creditors. If they are restricted to the assent of creditors whose claims originated after 1869, the required number and value have not assented;

and to escape this dilemma they present the assent of a single creditor whose claim is of earlier date. With this assent, if admitted, the scale is turned in their favor.

But this can not be allowed. The act imposes upon creditors of this class a disability. The provision for paying thirty pet cent. is in express language declared not to apply to them. They are not to be counted in ascertaining the number and amount of which the majority are required to assent. If they do not constitute any part of the quorum, they have no right to vote yea or nay. The creditors of later date alone constitute the body of voters. They can assent to the discharge, or, by withholding their assent, can prevent the discharge. This is their exclusive privilege, and that privilege can not be interferred with by the creditors of an earlier date. For these reasons the assent of such a creditor is simply a nulity, and the discharge must be refused.

An order will, therefore, be entered that unless the bankrupts do, within twenty days, procure the assent of the required number and amount of creditors whose claims have originated since January 1, 1869, the petition for discharge do stand dismissed with costs.

ABSTRACT OF DECISIONS OF SUPREME COURT OF ILLINOIS.

June Term, 1877.

HON. BENJAMIN R. SHELDON, Chief Justice.
" SIDNEY BREESE,
" T. LYLE DICKEY,
" JOHN SCHOLFIELD,
" PINCKNEY H. WALKER,
" JOHN M. SCOTT,
" ALFRED M. CRAIG,
Associate Justices.

BOND "TO THE PEOPLE OF THE STATE OF ILLINOIS."—The bond of the conservation of an idiot was required by statute to be made payable to the county treasurer. Such a bond was made payable to the people of the State of Illinois. This is a good bond, and is to be construed as payable to the people in their aggregate and not their individual capacity. By holding thus, no statute, rule of law or of sound public policy is violated. Opinion by WALKER, J.—*Richardson v. The People.*

EXECUTION—SALE AND DELIVERY OF CHATTELS.—A constable levied on a horse in actual possession of an execution debtor and certain other chattels found upon his premises. The constable was notified by the landlord of the debtor that he was the owner of the property levied upon, it having been sold to him by the execution debtor in liquidation of prior indebtedness. There was not in this case such a delivery of possession as will take the case out of Thornton v. Davenport, 1 Scam. 296 and Thompson v. Yeck, 21 Ill. 73. Judgment reversed and cause remanded. Opinion PER CURIAM.—*Allen v. Carr.*

MUTUAL BENEFIT ASSOCIATION — INSURANCE — WARRANTY.—The following language does *not* constitute a warranty: "It is hereby declared that the above are true and fair answers to the foregoing questions, in which there is no misrepresentation or suppression of known facts; and I acknowledge and agree that the above statement shall form the basis of the agreement with the society." This conclusion is reached from a consideration of the character of the interrogatories to which the above was subjoined, and also from the fact that it contained the words, "in which there is no misrepresentation or suppression of knowledge." Opinion by WALKER, J.—*Illinois Masons Benev. Society v. Winthrop.*

PLEADING—ACTION AGAINST HEIRS AND ADMINISTRATOR.—An action was brought against the heirs alone of a decedent upon his promissory note. The declaration contained no averment that no administrator was appointed within one year of the death of the deceased; but it did state that the personal effects of decedent were insufficient to pay the note. Such a declaration can not be sustained, for the averments do not show such a state of facts as authorize an action against the heirs without joining the administrator; for *non constat*, but that there was enough in the hands of such administrator to have paid a portion of the debt. Reversed and remanded. Opinion by CRAIG, J.—*Hoffman et al. v. Wilding.*

PROMISSORY NOTE—ATTORNEY'S FEE—REMITTITUR—COSTS.—There was attached to a promissory note a power of attorney, which authorized an attorney of any court of record to waive process and confess judgment against appellant for the amount of the note and interest and an attorney's fee of ten dollars. Suit was entered upon this note and judgment rendered upon the note and for the attorney's fee of ten dollars. Appeal was taken to this court and the fee of ten dollars having been remitted after appeal had been taken, the judgment was affirmed with the exception of the amount remitted, the costs in this court being taxed against the appellee, the remittitur having been entered after appeal taken. Opinion by CRAIG, J.—*Dowty v. Holtz.*

MANDAMUS — BOARD OF AUDITORS. — This was a cognate proceeding with that of The People *ex rel.* Phillips v. Lieb, *supra*, for a mandamus to the Board of Auditors of the Town of South Chicago to require them to advise and consent to the appointment of the relator as assessor and of deputies to assist in making the assessment. The answer denied that the fact of any application to the board for the appointment of deputies or of their refusal to advise and consent to their appointment by him; and moreover, that they had advised and consented to the appointment of one Gray, an appointed assessor of the town. This answer was demurred to, and it was *held*, that there had been no default in the non-performance of the duty which it is sought to have required to be performed, and until there has been such a default there can be no title to the writ of mandamus. Mandamus refused. Per CURIAM.—*The People ex rel. Phillips v. Lincoln et al.*

MUNICIPAL CORPORATION—POWER TO ARBITRATE CLAIMS.—As a general proposition municipal corporations have the same powers to liquidate claims and indebtedness that natural persons have, and from that source proceeds power to adjust all disputed claims, and when the amount is ascertained to pay the same as other indebtedness. It would seem to follow therefrom, that a municipal corporation, unless disabled by positive law, could submit to arbritration all unsettled claims with the same liability to perform the award as would rest upon a natural person, provided, of course, that such power be exercised by ordinance or resolution of the corporate authorities. It is no objection to the validity of such ordinance, that it was passed at a meeting of the city council at which all members were not notified to be present, provided, that the ordinance be approved at a subsequent regular meeting. Nor is the ordinance an act *ultra vires* the corporation although the work for which damages are claimed was done outside of the city limits, provided, it is a part of a work which the corporation has power to perform. Opinion by SCOTT, J.—*City of Shawneetown v. Baker.*

MANDAMUS — COUNTY CLERK.—The relator asked for a writ of mandamus to issue to a county clerk to compel him to deliver to petitioner the books and

blanks prepared by such clerk for the assessment of property of the township of South Chicago, of which petitioner claimed to be assessor. The county clerk answered that the justices of the peace of said township, the supervisor and town clerk, at a meeting held by them, decided that there had been no election of assessor for the township, and appointed one Gray to fill such position, and upon demand of their appointee he had delivered the books and blanks asked for in this petition, further alleging that it would be a physical impossibility to prepare new books and blanks in season to make the assessment. This answer was demurred to and it was *held*, that the only question which can arise in this proceeding is the *fact* of appointment, not the *rightfullness* of the appointment. The boa d of appointment here did expressly find that there had been a failure to elect an assessor, and filled the vacancy so found by appointment, made in legal form. Moreover, to command this clerk to get back the books which he had issued to the rival assessor would be to pervert this writ of madamus to a most extraordinary purpose. Mandamus refused. Opinion by SHELDON, C. J.; SCOTT, J., dissenting.—*The People ex rel. Phillips v. Lieb.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF INDIANA.

May Term, 1877.

HON. SAMUEL E. PERKINS, Chief Justice.
" HORACE P. BIDDLE,
" WILLIAM E. NIBLACK,
" JAMES L. WORDEN,
" GEORGE V. HOWK,
} Associate Justices.

GRAND LARCENY—" LAWFUL MONEY OF THE UNITED STATES." — In this case the indictment charged the defendant with the larceny of "seventy-five dollars of the lawful money of the United States." Lawful money of the United States must be either gold or silver coin, or United States Treasury notes and the fractional currency. There was no evidence that the money stolen was either of these kinds. The State having alleged that the money stolen was money of the United States was bound to prove the allegation as made, and having failed to do so, the case fell to the ground. Opinion by WORDEN, J.—*Hamilton v. The State.*

CRIMINAL LAWS — MOTION IN ARREST OF JUDGMENT—CREDIBILITY OF WITNESS.—1. A question which involves an inquiry into the manner of the organization of the grand jury, and not as to its jurisdiction of the offenses, can not be raised by a motion in arrest of judgment. 50 Ind. 169. 2. On the trial, the court instructed the jury as follows: "The defendant has testified in his own behalf. His testimony, however, is subject to the usual tests of credibility as other witnesses. One interested will not usually be as honest and candid as one not so." *Held*, the charge was calculated to make an erroneous impression on the jury, and they must be presumed to have been misled by it. Opinion by NIBLACK, J.—*Veatch v. The State.*

AFFIDAVIT OF NON-RESIDENCE—SUFFICIENCY OF.—It is a fundamental rule of law that statutory provisions for acquiring jurisdiction of the person of a defendant for publication must be strictly pursued. It is not the privilege of the court to dispense with any provisions of the statute, but its duty to see that they are strictly complied with. The affidavit must show that the defendant is a necessary party to the suit, and is a non-resident; both allegations are material, and the omission renders the affidavit fatally defective. 2 R. S. 1876, 49. The affidavit, for not containing the first allegation, was insufficient, the order of publication made upon it was void, the court acquired no jurisdiction by means of it, and the decree of foreclosure as to the non-resident was void. 10 Ind. 265, overruled as to the point involved. Opinion by PERKINS, C. J.—*Fontaine v. Houston et al.*.

STATUTE OF FRAUDS—CONTRACT IN CONSIDERATION OF MARRIAGE—DIVISIBILITY.—Where a widow and a widower, each owning personal and real property in their own right and having children alive, the issue of former marriages, intermarried with each other and prior thereto mutually agreed by parol that if either died before the other, the survivor would not claim any of the real or personal property owned by the other, *held*, that the contract was not one made in consideration of marriage, but rather in contemplation of marriage, the consideration of the contract not being a promise to marry, but the mutual relinquishment of prospective property rights, and was not within the statute of Frauds, which requires contracts in consideration of marriage to be in writing 25 Conn. 156. *Held*, also, that a part of the contract was within that clause of the statute which requires contracts for the sale of real estate to be in writing, and as the contract was entire and not separable, the whole was void. Opinions by PERKINS, C J.—*Rinebolt v. East, Admr. etc.*

VENDOR'S LIEN—WAIVER OF—WIFE'S SEPARATE ESTATE.—It is the settled law in Indiana that a vendor of real estate may have a lien upon it for unpaid purchase money against a married woman; but if the vendor take a distinct and independent security for the purchase money he waives his lien upon the land. 18 Ind. 422; 26 Ind. 364. In this case A., a married woman, purchased real estate, paying part of the purchase price in cash and for the residue the vendor took the note of B., A not being a party to this part of the transaction. Afterwards, however, A. told B. that if he paid the note he should have a lien on the land for the amount. B. having paid the note brought suit against A. and her husband, to establish his lien on the land. *Held:* 1. That, by taking the note of B. the vendor waived his lien on the estate. 2. That a married woman cannot bind her real estate by contracts except for the betterment thereof, and that the promise of A., made when neither the vendor nor B. had any lien on the land, and when B. was bound to pay the note without any inducement being held out to him by A. was not an undertaking for the benefit of said land and was therefore null and void. Opinion by PERKINS, C. J.—*Haskell et al. vs. Scott.*

RELIEF FROM JUDGMENT—EXCUSABLE NEGLECT.—In a proceeding under the statute 2 R. S. 1876, 82, which provides that the court shall relieve a party from judgment taken against him, " through his mistake, inadvertence, surprise or excusable neglect," or complaint filed within two years, two things must be shown by the party seeking such relief: 1. That he has a meritorious cause of action or defense; and 2. The facts which show that such judgment was taken in the manner set forth in the statute. Such complaint should be heard by the court in a summary manner, but neither counter affidavits nor contradictory evidence should be received as to whether or not the party seeking relief has a meritorious cause of action or defense, but on all other questions any competent evidence should be received. Where it appears that the party seeking such relief from a judgment was a German with an imperfect understanding of the English language and but little knowledge of business and legal proceedings, and was misled by what was said and done, without any intention on the part of any one to mislead or deceive him, *held*, the facts showed excusable neglect. Opinion by HOWK, J.—*Nord v. Marty.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF OHIO.

October Term, 1876.

Hon. JOHN WELCH, Chief Justice.
" WM. WHITE,
" W. J. GILMORE,
" GEO. W. MCILVAINE,
" W. W. BOYNTON,
} Associate Justices.

A SALE BY THE ASSIGNEE OF AN INSOLVENT CORPORATION made by him in good faith, is not invalidated or affected by the fraud of a stockholder, committed without the knowledge or privity of the assignee. Opinion by MCILVAINE, J.—*Trevitt v. Converse.*

REVERSAL OF JUDGMENT—ACTION ON RESTITUTION BOND—SET-OFF.—1. When a judgment is reversed, as a general rule, the plaintiff in error is entitled to a judgment of restitution for all that he lost by reason of the judgment. 2. The claim on which the original action was brought, can not be an available set-off in an action on a restitution bond, executed in pursuance of section 522 of the code, by dismissing the original action or otherwise. Judgment reversed. Opinion by GILMORE, J.—*Bickett v. Garner.*

JUSTICE'S COURT—APPROVAL OF APPEAL—RIGHT TO DENY EXECUTION.—1. The approval of a justice of an undertaking for appeal and the entering of such undertaking on his docket, does not preclude the parties purporting to have signed it from denying its execution. 2. Where in the body of such undertaking the names of several persons appear as sureties for the appellant, only a part of whom subscribe their names below the written stipulations, the undertaking is to be regarded, *prima facie*, as not executed by those whose names appear only in the body of the instrument. Judgment reversed. Opinion by WHITE, J.—*Ford v. Albright.*

FRAUDULENT VENDEE—BONA FIDE PURCHASER—EQUITIES—SURETIES.—1. A *bona fide* purchaser of a debtor's land from a fraudulent vendee, without notice of the fraud, or of the rights of the creditor, acquires an equity superior to that of a creditor who obtained a judgment against the debtor, and levied his execution on the land, after the date of the fraudulent sale, and prior to that of the *bona fide* purchase. 2. A surety of a debtor who takes a mortgage for his indemnity as such surety, is to be regarded in equity as *bona fide* purchaser within this rule, and will be protected to the extent of his liability as surety. 3. Such mortgage executed to one or more of several sureties on the official bond of an officer, inures to the benefit of all the sureties as well to those who subsequently became such under an order of court, requiring "additional sureties" in pursuance of law, as to those who were sureties at the date of the mortgage. Opinion by WELCH, C. J.—*Farmer's Nat. Bank v. Teeters.*

ABSTRACT OF DECISIONS OF THE SUPREME COURT COMMISSION OF OHIO.

HON. LUTHER DAY, Chief Justice.
" JOSIAH SCOTT,
" D. T. WRIGHT,
" W. W. JOHNSON,
" T. Q. ASHBURN,
} Justices.

INTENT TO DEFRAUD—AUTREFOIS ACQUIT—PROOF OF PREVIOUS ACQUITTAL—RECORD—ADULTERATION OF MILK—EVIDENCE—SEPARATION OF JURY.—1. Section 96 of the code of criminal procedure, where it is necessary to allege an intent to defraud, dispenses with the necessity of alleging an intent to defraud any particular person. 2. A conviction or acquittal on an indictment for a single offence, is a bar as to but one offense; and when pleaded in bar to a subsequent indictment, on the ground that the offense in both indictments is the same, the identity of the offense must be proved by the defendant, and it may be shown by parol evidence. 3. The production of the record, with proof showing that the same evidence which is necessary to support the second indictment, would have been admissible and sufficient to procure a legal conviction upon the first, will generally make a *prima facie* case on the part of the defendant, which the state may meet by proof that the offense charged in the second indictment was not the same as that charged in the first. 4. Where, upon a trial under an indictment containing but a single charge, the state has offered evidence tending to prove several distinct offenses, upon either of which a conviction might be had, it is the duty of the court, on motion of the defendant, to require the prosecutor, before the defendant is put on his defense, to elect upon what particular transaction he will rely for a conviction. 5. Where a former conviction or acquittal has been pleaded, though the offense charged in the second indictment might have been proved, and a conviction had under the first, the state may prove that on the former trial it elected what transaction it would rely upon for a conviction in that case, and that such transaction was different from that elected and solely relied upon for a conviction in the second case. 6. Where the record of the former trial is silent in regard to such election, proof that the election was made does not contradict the record, and may be made by parol. 7. Upon the trial of an indictment for knowingly delivering skimmed milk to a factory, to be manufactured into cheese, with intent to defraud, evidence of transactions of the same kind, other than that relied upon for a conviction, near the same time, is admissible for the purpose of showing guilty knowledge, on the part of the accused, that the milk, for delivering which a conviction is sought, was skimmed milk. 8. The requirement of the second section of the act, prohibiting the adulteration of milk, that each manufacturer of cheese or butter shall post a copy of the act in the receiving room of his factory, is directory only, and a failure to do so will not exculpate an offender under the first section of the act. 9. Under section 164 of the code of criminal procedure, as amended January 5, 1871, (68 O. L. 5), the separation of the jury in the trial of a criminal case, after they have agreed upon a verdict, is left to the discretion of the court; and where, on such separation, by direction of the court, nothing is done to the prejudice of the defendant, it is not such misconduct of the jury as necessarily to require the granting of a new trial. Judgment affirmed. Opinion by DAY, C. J.; JOHNSON, J., dissenting.—*State v. Bainbridge.*

OHIO STATUTES AS TO MARRIED WOMEN—CONSTRUCTION.—1. By the act concerning the rights of married women, passed April 3, 1861, (S. & S. 389), as amended March 23, 1866, (S. & S. 391), the *general estate*, as well as the *separate estate*, of a married woman, belonging to her at her marriage, and all her estate, legal and equitable, which may come to her during coverture, by conveyance, gift, devise or inheritance, or by purchase with her separate means or money, together with the rents and issues thereof, becomes her *separate* property and under her control, free from the marital rights of the husband at common law over the same. 2. By these statutes the wife is authorized to make contracts, *in her own name*, for labor and materials for improving, repairing and cultivating her separate estate, as defined by this statute, and for leasing the same for a term not exceeding three years. Upon such contracts the wife is liable to an *action at law*, and to a judgment and execution, as a

femme sole, but all her other engagements, debts or obligations, are void at common law, the same as before the passage of said acts. 3. By these statutes the marital rights of the husband were divested as to the wife's *general estate*, and the wife was invested with the control of the same, and could bind it not only by the contracts which she was authorized to make in her own name, but to the same extent as she could charge her separate estate in equity, before said statutes were passed. 4. The power of a court of equity to charge the separate estate of a married woman, as it existed and was exercised prior to said statutes, still exists, not only as to such separate property, but also as to her separate property as defined by such statutes, except as to such contracts as she is authorized to make in her own name, upon which a remedy at law is given by said statutes. 5. The ground upon which a court of equity charges a married woman's separate estate, for her general engagements, in the absence of a valid contract binding the same, or of an express charge thereon, is not because her contracts have any validity, nor by way of appointment, or charge, but because the circumstances are such that equity decrees it to be just, that they should be paid out of such estate. 6. Something more than merely incurring the obligation, which the law would create, if she were a single woman, is necessary to affect the estate of a married woman, and in order to bind the separate estate by a general engagement, it should appear that it was made by her with reference to and upon the faith and credit of that estate, under such circumstances as makes it equitable that such charge should be enforced. 7. An answer of a married woman, made to an action by the indorser of a promissory note, to charge her separate estate, on her indorsement thereof, which denies that she intended to charge her separate estate, and avers that she indorsed the same through the influence and persuasion of her husband, and not of her own free will, and that she received no part of the money paid for said note, but the same was used for the sole benefit of her husband, states a good defense to such action. 8. The indorsement by a married woman of a promissory note, solely for the accommodation of her husband, and as surety thereon, in order to enable him to dispose of the same, is of itself not sufficient to warrant a court of equity in presuming that she intended to charge her separate real estate with the payment of the same. Opinion by JOHNSON, J.—*Levi v. Earl.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF WISCONSIN.

August Term, 1877.

HON. E. G. RYAN, Chief Justice.
" ORSAMUS COLE, } Associate Justices.
" WM. P. LYON, }

ACTION TO RECOVER MONEY ON VOID CERTIFICATES — TAX CERTIFICATES. — Where money has been paid as the price of something sold and delivered to the vendee, and by reason of some fact or circumstance not contemplated by either party to the transaction, such money ought to be refunded, an action, therefore, will not lie until after *demand* made. In an action, therefore, against a municipal corporation, to recover moneys paid for tax certificates alleged to be invalid, the complainant is void on demurrer if it fails to show a demand made before suit. Opinion by LYON, J.—*Stocks v. City of Sheboygan.*

BILL OF EXCEPTIONS—RECORD—PRACTICE. — 1. The ruling of the trial court sustaining an objection to the admission of any evidence under the complaint, and its order that the complaint be dismissed on that ground, must be preserved by bill of exceptions, or they form no part of the record; and an appeal purporting to be taken from such an order, without any bill of exceptions, is here dismissed. 2. In such a case, the bill of exceptions should be settled, and the ruling brought up for review upon appeal from the *judgment;* and if defendant neglects or refuses to enter judgment, the plaintiff can have it entered. PER CURIAM.—*Johames v. Youngs.*

POWER OF LEGISLATION TO LEGALIZE DEFECTIVE PROCEEDINGS.—1. The power of the legislature, by curative acts, to legalize defective proceedings under previous statutes, is dependent on its continued or present power to authorize proceedings like those so sought to be legalized. 2. Ch. 20, Laws of 1877, which purports to legalize the acts and proceedings of officers of the town of Rosendale, in the assessment and collection of certain taxes authorized by act of 1871, is invalid, because, since the constitutional amendment of 1871, the legislature has no authority to pass any *special* law for the assessment and collection of taxes. Opinion by RYAN, C. J.—*Kimball v. Town of Rosendale.*

APPEAL—ORDER—MOTION—COSTS.—After reversal here of an order vacating, on defendant's motion, a judgment taken by default, defendant, upon an affidavit of merits and papers showing that the default occurred from a mistake for which both parties were responsible, again moved to vacate and admit a proposed verified answer, alleging payment in part of the indebtedness charged in the complaint. *Held*, that the court properly required, as terms of the relief sought, payment of the costs of the former appeal, and of so much of the judgment as is admitted to be due; but it was error to require defendant to pay, either to the plaintiff or into court, any sum of which the answer pleads payment. Opinion by RYAN, C. J.—*Pier v. Amory.*

EVIDENCE — COMPETENCY OF HUSBAND OR WIFE IN ACTION FOR INJURIES TO THE WIFE—CONTRIBUTORY NEGLIGENCE.—1. In an action by husband and wife to recover damages resulting from personal injuries to the wife, where the husband's claim for loss of service is joined (under ch. 96 of 1873), a general objection to the competency of the wife or husband as a witness in the action is void, and does not raise the question whether the examination of either witness could be restricted. 2. The court having submitted the case to the jury to find upon *all* the circumstances attending the accident, whether there was any want of ordinary care on plaintiff's part, there was no error in refusing an instruction that they might infer contributory negligence from the fact that plaintiff, a short time before stepping into it, passed directly by the hole in the walk, which was the defect complained of. Opinion by COLE, J.—*Husband and Wife v. City of Fond du Lac.*

CERTIORARI—COMMON COUNCIL OF CITY.—1. The common council of Fon du Lac being a permanent body, which has legal control of all its records, and appoints the city clerk, a *certiorari* to bring up the acts and proceedings of that body, touching the laying out of a new street, properly runs to it, and not to the city clerk. Milwaukee Iron Co. v. Schubel, 29 Wis. 444, distinguished. 2. The appeal allowed by the charter of said city from the commissioners of appraisers to the council, and from the latter to the circuit court, where a lot-owner is dissatisfied with the amount assessed against his lot for damages or benefits resulting to it from a city improvement, does not raise in the circuit court the question of the validity of the proceedings for making such improvement, but only the question of damages or benefits; and *certiorari* will lie from that court to try the validity of such

proceedings. Opinion by COLE, J.—*State ex rel. Flint v. City of Fond du Lac.*

FORCIBLE ENTRY AND DETAINER.—1. A., with the aid of six or eight men, hastily tore down a part of the fences around a lot which had been for a year and a half in the peaceable possession and occupation of B., and with great haste moved thereon a shop, in the absence of B. and his family from the premises, and without personal violence or intimidation toward any person, but without the consent of B. *Held*, that the jury were warranted in finding a forcible entry. 2. B. afterwards went to the shop, which was occupied by A. with several workmen, and informed A. that he had taken possession unlawfully, and requested him to remove without delay; and A. answered that "no one could get him away unless he were forced to go by law." *Held*, that this language imported that A. would resist by force all attempts to remove him except through legal process, and warranted the jury in finding a forcible detainer. Carter v. Van Dorn, 36 Wis. 289, distinguished. Opinion by COLE, J.—*Steinland v. Halstead.*

ADVERSE POSSESSION—PRESUMPTION—TAX DEED.—1. Where one enters upon land under claim of title in fee, and continues the possession and the claim so as to set section 8 of the statutes of limitations running in his favor, he may be taken as the owner for all purposes of taxation. 2. The presumption that the entry upon the land was adverse, created by said section 8, does not arise until the statute has fully run, and does not arise at all if the occupation has been without claim of title. 3. The taking of a tax deed by one who occupied the land when the tax was levied is presumptively inconsistent with any previous claim of title in himself; and in the absence of any evidence that his previous entry or occupation was under color or claim of title, he must be assumed to have been a mere intruder, and, as such, capable of acquiring adverse title by tax deed or other conveyance to himself. 4. Where one who has entered upon and occupied land as a mere intruder records a tax deed thereof running to himself, this is equivalent to a new entry, under claim of title, and from thence his possession is adverse. Opinion by RYAN, C. J.—*Link v. Doerfer.*

IRREGULARITY IN APPEAL NOT JURISDICTIONAL—WAIVER—PRACTICE.—1. While a notice of appeal from a judgment and from an order, there being no order in the record, is *irregular*, and the duplicity is grouud of dismissal, is not jurisdictional, and may be *waived*, there being no difficulty in applying the notice to the judgment. 2. In general there should be but one motion to dismiss an appeal for causes existing when the motion is made; and where grounds of dismissal appear in the record below, they should be included in any motion to dismiss made before the record is returned. 3. The respondent moved to dismiss the appeal herein merely on the ground that no return had been made; and, on a hearing after return made, this court ordered a dismissal unless appellant should pay the costs of the motion. After payment and acceptance of such costs, respondent moved to dismiss on the ground that the appeal was double. The appeal was in form from the judgment and from an order, but there was no order in the record. *Held*, that the objection for duplicity was *waived* by failing to include it in the former motion, and by acceptance of the costs of that motion. Opinion by RYAN, C. J.—*Pettit v. Hamlyn.*

NEGLIGENCE—ACTION AGAINST CITY—MEDICAL TESTIMONY.—1. In an action for injuries to plaintiff's person, caused by her stepping through a hole in the sidewalk of the defendant city, where there was evidence that the walk was on one of the principal thoroughfares of the city, and that the hole had existed there for several months, this was sufficient to warrant the jury in finding the city chargeable with notice of the defect. 2. There being no testimony that plaintiff was predisposed to disease of any kind, but all the evidence relating to that point showing that prior to the accident she was healthy, strong and robust, a medical witness produced by the defendant city, who had heard a portion of the evidence as to her subsequent condition of ill health and uterine derangement, but who had made no medical examination of the plaintiff, and knew nothing about the actual condition of her health before the accident, testified that his view was that she might have suffered unconsciously from some previous uterine disease, or was predisposed to such disease, and that the accident acted as an exciting cause to develop it. *Held*, that the court properly refused an instruction asked by the city as to the rule of damages in case the jury should find that plaintiff was predisposed to disease, etc., there being no evidence in the case which would warrant such a finding. Opinion by COLE, J.—*Hall v. City of Fond du Lac.*

ABSTRACT OF DECISIONS OF SUPREME JUDICIAL COURT OF MASSACHUSETTS.

March Term, 1877.

HON. HORACE GRAY, Chief Justice.
" JAMES D. COLT,
" SETH AMES,
" MARCUS MORTON,
" WILLIAM C. ENDICOTT, } Associate Justices.
" OTIS P. LORD,
" AUGUSTUS L. SOULE,

JUDGMENT—EXCEPTION.—A judgment of the Superior Court, sustaining a motion to dismiss the action on the ground of the insufficiency of the writ is final, and not a subject of exception. Gen. Sts. c. 115 §7; Smith v. Dexter, 121 Mass. 597. PER CURIAM.—*Kennedy v. Laugdon.*

TRESPASS—EVIDENCE—EXPERT.—Where, in an action of tort, for trespass upon the land of the plaintiff, in order to fix the disputed boundary line, it was necessary to establish a certain corner, a surveyor, who was a competent expert, having knowledge of the matters inquired of, was rightly permitted to testify. PER CURIAM. *Knox v. Clark.*

ARBITRATION—BIAS.—The fact that an arbitrator had previously acted as counsel for the plaintiff in a former action, of which the defendant was ignorant, there being no intentional concealment on the part of the plaintiff or his counsel, is not a sufficient ground for setting aside the award. Opinion by GRAY, C. J.—*Goodrich v. Hulbert.*

PROMISSORY NOTE — ASSIGNMENT — DEFENSE.—Where a note was given to the nominal plaintiff, a married woman, by the maker in consideration of the husband giving up to him a like note; and the equitable right in it was transferred by her with her husband's consent to the real plaintiff, a creditor of the husband, the maker can not set up in defense of a suit upon such note, that this transfer was a fraud upon other creditors.—PER CURIAM. *Harding v. Colon.*

INTOXICATING LIQUORS—EVIDENCE.—Upon a complaint charging defendant with the unlawful keeping for sale of spiritous and intoxicating liquor upon a certain day, evidence of the condition of the room in which the liquors were alleged to be kept, as to appointments and fixtures, at eight o'clock in the morning of the next day, was competent to be considered by the jury, upon the question whether it was in the same condition on the day before. PER CURIAM.—*Com. v. Powers.*

BANKRUPTCY—DISCHARGE—JUDGMENT.—Under § 5106 of U. S. Rev. Sts., this court has repeatedly held that an action at law by a creditor, whose case is provable but has not been proved in bankruptcy, is not absolutely barred, and that of a bankrupt does not move for a stay of proceedings for the purpose of obtaining and pleading his discharge, and the assignee does not intervene in defense of the action, the court may proceed to judgment. Dunbar v. Baker, 104 Mass. 211; Cutler v. Evans, 115 Mass. 27; Ray v. Wight, 119 Mass. 126. *In re* Williams, 6 Bissell, 233, and Wills v. Claflin, 92 U. S. 135, explained and distinguished; and see Doe v. Childress, 21 Wall., 643. *Holland v. Martin.*

WRITTEN CONTRACT—PAROL VARIATION — EVIDENCE—AGENCY.—1. Although a contract of sale is in writing, the manner of payment may be modified by subsequent oral agreement. 2. Upon the question whether plaintiff's agent had authority to modify the manner of payment, evidence tending to show that prior to the execution of the agreement of sale the defendant told the plaintiff that his agent had agreed that a bill of defendant's against said agent should be applied in part payment of the price of said machine and that the plaintiff had thereupon assented to said agreement, is competent. 3. Upon the question whether the plaintiff did agree to such modification after the execution of the original contract, evidence tending to show that after the execution of said agreement the agent of the plaintiff said to defendant that the bill against him should be applied in part payment of the price and that plaintiff had agreed that such application should be made, is competent. PER CURIAM.—*Shaffer v. Sawyer.*

CONTRACT—EVIDENCE.—1. In an action to recover for the use of the plaintiff's derrick, a witness for the plaintiff on cross-examination testified that said derrick was somewhat worn and that one of the blocks broke, and one of chains broke frequently. On re-examination, plaintiff asked: "Is it a usual thing for blocks and chains on any derrick to break when in use?" to which the witness under objection answered "yes." *Held*, that the evidence was competent to show that the derrick was of the ordinary quality. 2. Where, in such an action, it appears that the plaintiff stated to defendant that his charge for the use of the derrick would be $1 per day, Sundays excepted, from the time he should take it till he returned it, to which price defendant objected, but subsequently, without any other conversation as to price, sent for it. The claim for the use of the derrick by defendant was supported by proof that he had it in his possession with the right to use it whenever he pleased. PER CURIAM.—*Reilly v. Rand.*

PROMISSORY NOTE—ALTERATION— RATIFICATION.—Where, upon suits brought by the administration of the payee of a promissory note against the administratrix of the maker and the surety upon said note, it appeared that, upon the the death of the payee, his children made a division of his personal property among themselves, and that the note in question fell to his daughter, M. that thereafter the maker came to the house where said M. lived, to pay his interest, which by agreement with the payee had been fixed at 7 3-10 per cent.; that a demand having been made for the principle, the maker agreed to pay 8 per cent. interest, and that the brother of M., in the presence of the maker and with his assent wrote the words "at 8 per cent.;" that thereafter the surety was informed of such transaction, and made a payment of interest at 8 per cent. *Held*, that the legal title in the note was in the administration of the payee, and that the evidence warranted the jury in finding that both the defendants assented to and ratified the note in its altered form, and thereby agreed to pay the same to the lawful holder, for the sufficient consideration of an agreement to forebear and an actual forbearance by those who apparently had the actual control of the note and the equitable interest therein. PER CURIAM.—*Prouty v. Crawford.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF KANSAS.

July Term, 1877.

HON. ALBERT H. HORTON, Chief Justice.
" D. M. VALENTINE, } Associate Justices.
" D. J. BREWER, }

CASE MADE—PRACTICE.—1. Where the record discloses that on January 11, 1875, the motion for a new trial was overruled, and sixty days from the rising of the court given to make a case; that on March 1, 1875, a copy of the case made was served on the opposing counsel, and that the case was settled and signed by the trial judge, but fails to show that any amendments were suggested, or that there was any waiver thereof, or any appearance of opposing counsel or when the case was settled and signed by the judge; *held*, that the record fails to show a "case made" legally settled and signed, and that therefore, this court cannot consider any matters contained therein. Case dismissed. Opinion by BREWER, J. All the justices concurring.—*The M. K. & T. R. Co. v. Roach.*

TAXATION—CAPITAL STOCK.—1. In 1873, the Lawrence Gas, Coke and Coal Company was a corporation located and doing business in the City of Lawrence, and was taxable and taxed therein. The plaintiff owned 115 shares of the capital stock of said corporation, and resided in Wakarusa township, and not in the City of Lawrence. *Held*, that he was not taxable on said shares of stock in the said City of Lawrence. 2. In 1873, the plaintiff listed for taxation all his personal property, subject to taxation in Wakarusa township, and duly paid the taxes thereon; and all the property belonging to said corporation was also listed, and the taxes were duly paid thereon. Also, in the same year, some person or persons, without any notice to the plaintiff, or any authority from him, listed for taxation in the City of Lawrence, in his name 115 shares of the capital stock of said corporation, and taxes were levied on said shares against the plaintiff. *Held*, that said last mentioned listing, and said last mentioned levy of taxes, were and are illegal. Judgment reversed. Opinion by VALENTINE, J. All the justices concurring. *Griffith v. Watson.*

ACTION BY A NEXT FRIEND.—Where a mother, who is the only surviving parent of a minor son, commences an action in her son's name, as his next friend, and sets forth in the petition a cause of action for injuries to the person of her son, and also sets forth loss of time by her son on account of such injuries, and also expenses incurred by her son in regaining his health from such injuries, and asks judgment for her son for damages accruing on account of such loss of time and expenses; *held*, that compensation for such loss of time and expenses may be recovered in such action, notwithstanding it may be shown that the mother has never relinquished to her son his time or services in any manner except by the commencement and prosecution of such action; and further, *held*, that by reason of the commencement and prosecution of such action, it must be conclusively presumed that the mother relinquished and gave to her son all compensation for such loss of time and expenses. Judgment affirmed. Opinion by VALENTINE, J. Horton, C. J., concurring. Brewer, J., concurring specially.—*Abeles v. Bransfield.*

BOOK NOTICES.

TYLER ON PARTNERSHIP.—A Commentary on the Law of Partnership, with Forms, by SAMUEL TYLER, LL. D., Professor in the Law Department of Columbia University, at Washington, D. C.; author of the "Maryland simplified Pleading," etc., etc. Washington, D. C.: W. H. & O. H. Morrison. 1877.

This is a duodecimo of 160 pages, intended for the student. The doctrines, of course, are only stated in outline. No authorities are cited—a great mistake, we think; for it deprives the industrious student of the means of extending his investigations into the reports and larger treatises. We should judge that this would be a useful manual for business men.

COX'S COMMON LAW PRACTICE. — Common Law Practice in Civil Actions. By WALTER S. COX, of the Bar of Washington, D. C., Instructor in the Columbian Law School Washington: W. H. & O. H. Morrison. 1877.

This volume, embracing 372 printed octavo pages, is a compendious statement of the common law practice, as *Americanized* by usage and statutory changes. The rules laid down appear to be drawn from such standard authorities as Chitty and Archbold; but the statements made by the author are not, in general, supported by the citation of any authority. It is intended for the use of students in law schools, and its aim is to convey to them, in outline merely, some idea of procedure in courts of common law. For this purpose, we should judge it to be a useful compilation. We are satisfied upon turning over its pages that the author has accomplished the particular object he had in view in a creditable manner. It is well printed and bound, and side-notes cut into the text facilitate reference.

ABBOTT'S NATIONAL DIGEST, VOL. 7.—A Digest of the Reports of the United States Courts, and of the Acts of Congress; from November, 1874, to July, 1877. By BENJAMIN VAUGHAN ABBOTT. Vol. VII. Being the Third Supplement to Abbott's National Digest. New York: Ward & Peloubet, Successors to Diossy & Co. 1877.

This volume embraces decisions in Wallace, vols. 19-23; United States, vols. 91-93; Holmes, vol. 1; Blatchford, vols. 11-13; Chase, vol. 1; Woods, vols. 1-2; Dillon, vol. 3; Bissell, vols. 4-6; Sawyer, vols. 2, 3; Benedict, vols. 6, 7; Fisher, vol. 6; Brown, vol. 1; Court of Claims, vols. 9-11; National Bankruptcy Register, vols. 10-14; McArthur, vol. 1; the current law journals and opinions of the Attorneys General. It comprises 630 printed, royal 8vo. pages, and is got up in a style similar to the other volumes of the series. Abbott's National Digest differs from Brightley's in that the abstracts of cases are fuller and more perspicuous. It is a monumental work, ranking next to Abbott's United States Digest, and entitles the author to the lasting gratitude of the American bench and bar.

SMITH'S ELEMENTS OF THE LAWS.—Elements of the Laws; or, Outlines of the System of Civil and Criminal Laws in force in the United States, and in the several states of the Union. Designed as a text book and for general use, and to enable one to acquire a Competent Knowledge of his Legal Rights and Privileges in all the most important Political and Business Relations of the Citizens of the Country, with the Principles upon which they are founded, and the Means of Asserting and Maintaining them in Civil and Criminal Cases. By THOMAS SMITH, late one of the Judges of the Supreme Court of Indiana. *New and Revised Edition.* Philadelphia: J. B. Lippincott & Co. 1877.

After quoting so elaborate a title page, it will not be expected that we should say much about the contents of this book. It is a duodecimo of about 400 pages, well printed and well bound in cloth, and sold at retail. we should judge, for about two dollars. It is extremely elementary in its character—cites no authorities in support of its propositions, but its foot notes consist of questions relating to the text. We should judge it to be a book well adapted for use in common schools, and its presence gives us occasion to express the hope that the time will come when the elements of the law will be deemed an essential part of every common school education.

REDFIELD ON WILLS, 3D ED., VOL. 3.—The Law of Wills: Embracing the Probating of Wills and the Settlement of Estates; the Duties of Executors, Administrators and other Testamentary Trustees. By ISAAC F. REDFIELD, LL. D., *Third Edition*, greatly extended and improved. Boston: Little, Brown & Co. 1877.

The preparation of the third edition of this most valuable work appears to have been far advanced, if not completed, at the time of the death of its distinguished author, which took place about the time the first volume was issued from the press. But as some months elapsed between that time and the going to press of this volume, it was entrusted to Wm. A. Herrick, Esq., the *fidus Achates* who had rendered so much assistance to Judge Redfield in the preparation and revision of his works, to bring it down to the latest practicable date. In the accomplishment of this task, Mr. Herrick states that he has limited himself to citing the more important cases which had been decided in this interval. With this exception, this volume is published in all respects as Judge Redfield left it.

In the preparation of this volume, the aim of the author was to embrace those matters which are connected with the settlement and distribution of the estates of deceased persons; and in carrying out this design, he has introduced new titles in the present edition, and added more than a hundred pages of new matter; so that this volume is only in a collateral sense a part of a treatise on the law of wills, but is emphatically a *book of practice* on the settlement of decedents' estates. This will be better understood from the following summary of its contents: The Probate of Wills; The Appointment and Duty of Executors and Administrators; The Estate of Executors and Administrators; Remedies by Executors and Administrators; Proceedings by Executors and Administrators; Remedies against Executors, etc.; Gifts *Mortis Causa;* Marshalling the Assets; Rights of the Widow; Allowances to the Executor, Distribution, etc.; Guardianship; Testamentary and other Trustees.

When there shall no longer be a Bonapartist party in France, and when the hearts of Frenchmen shall no longer stir at the recital of the military achievements of the second Charlemagne, justice will continue to be administered by the brief but perspicuous rules of the Code which bears the name of Napoleon,—in France, in Africa, in America, in the West Indies, and in the Islands of the Pacific Ocean. And when the name of Redfield shall have, upon the popular ear, no more than the vague meaning which now attaches to the names of Littleton and Coke, the jurist and the historian will not fail to acknowledge that he did more than any man of his time to render certain and uniform the administration of justice throughout the scattered States of the American Union.

WE DESIRE to return our public acknowledgments to R. A. D. Wilbanks, Esq., Clerk of the Supreme Court of Illinois at Mt. Vernon, for kindness shown by him to our correspondent, Mr. Merriam; and also to C. C. Hamburgher, Esq., Clerk of the same court at Springfield, for recent acts of politeness.

NOTES.

THE FIRST CLIENT.

[A legal ditty to be sung without chorus to the air of "The King's Old Courtier."

John Smith, a young attorney, just admitted to the bar,
Was solemn and sagacious as—as young attorneys are;
And a frown of deep abstraction held the seizin of his face—
The result of contemplation of the rule in Shelley's case.

One day in term-time Mr. Smith was sitting in the court,
When some good men and true of the body of the county did on their oath report,
That heretofore, to wit: upon the second day of May,
A. D. 1877, about the hour of noon, in the county and state aforesaid, one Joseph Scroggs, late of said county, did then and there feloniously take, steal, and carry away
One bay horse, of the value of fifty dollars, more or less,
(The same then and there being of the property, goods, and chattels of one Hezekiah Hess);
Contrary to the statute in such case expressly made
And provided; and against the peace and dignity of the state wherein the venue had been laid.

The prisoner, Joseph Scroggs, was then arrainged upon this charge,
And pleaded not guilty, and of this he threw himself upon the country at large;
And said Joseph being poor, the court did graciously appoint
Mr. Smith to defend him—much on the same principle that obtains in every charity hospital, where a young medical student is often set to rectify a serious injury to an organ or a joint.

The witnesses seemed prejudiced against poor Mr. Scroggs;
And the district attorney made a thrilling speech, in which he told the jury that if they didn't find for the state he reckoned he'd have to "walk their logs;"
Then Mr. Smith arose and made his speech for the defense,
Wherein he quoted Shakespeare, Blackstone, Chitty, Archbold, Joaquin Miller, Story, Kent, Tupper, Smedes, and Marshall, and many other writers, and everybody said they "never heard of sich a bust of eloquence."

And he said: "On *this* hypothesis, my client must go free;"
And: "Again, on *this* hypothesis, it's morally impossible that he could be guilty, don't you see?"
And: "Then, on *this* hypothesis, you really can't convict;"
And so on, with forty-six more hypotheses, upon none of which, Mr. Smith ably demonstrated, could Scroggs be derelict.

But the jury, never stirring from the box wherein they sat,
Returned a verdict of "Guilty;" and his Honor straightway sentenced Scroggs to a three-year term in the penitentiary, and a heavy fine, and the costs on top of that;
And the prisoner, in wild delight, got up and danced and sung;
And when they asked him the reason of this strange behavior, he said: "It's because I got off so easy—for if there'd ha' been a few more of them darned *hypotheses*, I should certainly have been hung."

IRWIN RUSSELL *in Scribner's Monthly.*

A LIFE of Sir George Rose, once a judge of the court of Review and a master in chancery, recently published in England for private circulation, contains many witticisms which, as the *Athenæum* remarks, are none the worse for their professional flavor. When one of his clerks in the master's office had lost his overcoat and was angry at the loss, the master quieted him with the remark: "If the suit's defective we can't proceed." Of a joker whose jest failed in the telling, Rose said: "Don't you see? He has tried a joke, but reserved the point." To a rector who asked him his opinion as to having prayers daily in the church, he answered that he had no objection, but hoped that service in his own house would be considered good service. And on Sir John Holt complimenting him on his young looks, Sir George put his hand to his head and said: "This d——d poll may not disclose the fact, but," opening his mouth, "this indenture witnesseth."

THE *Insurance Law Journal*, vol. 6, p. 719, contains a note of a decision of the Superior Tribunal of Commerce of the Empire [Germany], October 15, 1875, upon the effect of suicide upon a policy of life insurance. The fifth article of the policy provided: "The policy shall be forfeited if the assured lose his life in a duel, by suicide, or by the hand of justice, or if the assured have his life intentionally taken by a party interested in the policy." In the case in point the assured committed suicide, but it was proved that the suicide took place in an access of violent fever, during which the invalid was not in a state of consciousness. *Held*, that article 5 was not applicable, as it related solely to intentional acts, and the word suicide must be construed as voluntary death inflicted by a person upon himself when in a state of consciousness, and with full intention. The French courts have decided the above question in the same sense. *Vide* Trib. Civ. de la Seine, 25th July, 1854, etc. In Holland the law is the same. Magaz v. Handelsvegt, judgment arbitral d'avocats d'Amsterdam, 26th December, 1874.

"JUDGE NOT, THAT YE BE NOT JUDGED."—In the year 1863, as Jeffreys was making his northern circuit, he came to Newcastle-upon-Tyne. Here he was informed that some twenty young men of the town had formed themselves into a society, and met weekly for prayer and religious conversation. Jeffreys at once saw in these youths so many rebels and fanatics, and he ordered them to be apprehended. The young men were brought before his tribunal. A book of rules which they had drawn out for the regulation of their society was also produced, and was held by the judge as sufficient proof that they were a club of plotters. Fixing his contemptuous glance on one of them, whose looks and dress were somewhat meaner than the others, and judging him the most illiterate, he resolved to expose his ignorance, and hold him up as a fair sample of the rest. His name was Thomas Verner. "Can you read, Sirrah?" said the the judge. "Yes, my lord," answered Mr. Verner. "Reach him the book," said Jeffreys. The clerk of the court put his Latin Testament into the hands of the prisoner. The young man opened the book, and read the first verse his eye lighted upon. It was Matt. vii. 1, 2: "*Ne judicate, ne judicemini*," etc. "Construe it, sirrah," roared the judge. The prisoner did so: "Judge not, that ye be not judged; for with what judgment ye judge, ye shall be judged." Even Jeffreys changed countenance, and sat a few minutes in a muse; but instantly recovering himself he sent the young men to prison, where they lay for a year, and would without a doubt have been brought to the scaffold, had not the death of the king, which occurred in the meantime, lead to their release.—[*From the "History of Protestantism," by the Rev. Dr. Wylie*, for October.

"TOOTING" in Great Britain has been the subject of a number of articles in both the English and American law journals. One of the editors of this journal, who has just returned from a trip through the state of Ohio, came across the following effusion printed on the back of a postal card and addressed to a leading lawyer of Cincinnati: "Law Practice, —— ——, Attorney and Counsellor at Law, St. Paul, Minn., Sept. 29, 1877. All letters on business may be addressed to him, Public Law Library, where he will be making out law briefs from 9 a. m. to 5 p. m. Dinner from 12 to 2 p. m. excepted. Will furnish briefs of law, or facts where diligent investigation is necessary, and copy and send any law from any book in public library to lawyers outside of St. Paul, all for $1.00 per hour. After briefs of either law or facts are made out satisfactorily, determining the merits of any case, in any original case, he will where desired, associate with him any first-class lawyer in cases that can not be settled without trial, and then settle upon future fees. I have been in the law practice about one-third of a century in South Bend, Ind., and St. Louis Mo., and done Auerbach, Finch & Schaffer's business three years throughout this state, settling every suit brought without the necessity of a trial in a single case. All legal opinions warranted; and where the warranty does not hold good all fees to be returned on notice and demand. Terms cash, and stamps for return letters must be sent. All warrantys predicable of warranted facts, or his own investigation of them. On notification by postal card, he will call at any office on legal business. The principle of warranty is in practice, but that of a law-writer. He assumes that every statement of his book is law, is the law of reason, if it is not, he has fallen below an authoritative standard. For many years I have seen no occasion for changing opinions, for either courts or lawyers. The love of justice, unwearying investigation, and illumination of mind from God, are all necessary for the mastering of cases."